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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1588

CAROL VANCE, ET AL.,

Appellants,

V.

UNIVERSAL AMUSEMENT CO., INC., ET AL.,

Appellees.

GEORGE E. MCCREA, ET AL,

Appellants,

V.

KING ARTS THEATRE, INC.,

Appellees.

* * *

On Appeal From The United States Court of Appeals For The Fifth Circuit

* * *

JURISDICTIONAL STATEMENT

* * *

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* * *

On Appeal From The United States Court Of Appeals For The Fifth Circuit

* * *

JURISDICTIONAL STATEMENT

* * *

Appellants, Carol Vance, George E. McCrea, et al., appeal from the part of the judgment of the United States Court of Appeals for the Fifth Circuit, entered on December 18, 1978, which held unconstitutional a statute of the State of Texas, Article 4667(a)(3), Vernon's Texas Civil Statutes, and submit this statement to demonstrate that the Supreme Court of the United States has jurisdiction over this appeal and that a substantial question is presented.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit was entered on September

28, 1977, by a three judge panel, the opinion holding, in part, that Article 4667(a)(3), Vernon's Texas Civil Statutes was unconstitutional; the opinion is reported at 559 F.2d 1286. On rehearing *en banc*, the Court in its opinion entered on December 18, 1978, held that this statute was unconstitutional, the opinion being reported at 587 F.2d 159. Eight judges voted with the majority opinion and six judges dissented.

Notice of Appeal was given by these Appellants on January 15, 1979.

PRELIMINARY STATEMENT

Twenty cases involving the question presented by the appeal as well as other questions were consolidated before a three-judge court. That court determined that Article 4667(a)(3) was unconstitutional, the opinion being reported at 404 F. Supp. 33, and an appeal was made to the United States Court of Appeals with the results described above.

A concurrent appeal to the Court of Appeals was made by Bexar County District Attorney and Emil Peters, City of San Antonio, Texas, the appeal involving Article 4667(a)(3) and other statutes of the State of Texas. These same parties have filed a separate appeal and Jurisdictional Statement in this Court, which appeal again raises the question of the constitutionality of Article 4667(a)(3) and other matters not presented by the instant appeal.

STATUTE INVOLVED

The Texas nuisance statute, Article 4667, Vernon's Texas Civil Statutes, reads in pertinent part as follows:

> Injunctions to abate public nuisances
>
> (a) The habitual use, actual, threatened or contemplated, of any premises, place or

> building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the state or any citizen thereof:
>
> (1) . . .
>
> (2) . . .
>
> (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

Article 4666, Vernon's Texas Civil Statutes is not involved in the appeal by Appellants Vance and McCrea. This Article permits the mandatory closing of premises in certain nuisance situations; however, this provision was never applied by these Appellants, was not a part of their appeal to the Court of Appeals and the ruling of the Court of Appeals (majority opinion)--that the closing provisions are unconstitutional as applied to motion picture houses or book stores--is not questioned by these Appellants in this Court.

STATEMENT

The Article 4667 Injunction Process

No injunction prohibiting the dissemination of obscene materials was entered in the Fifth Circuit titular case, *King Arts Theatre, Inc. v. McCrea*, and the lead case, *Universal Amusement Company, Inc. v. Vance*, the original case before the three-judge district court, was settled and became merely the vehicle for the appeal to the Court of Appeals for all consolidated cases except for *Dexter v. Butler*, wherein a separate appeal was taken both to court below and to this Court.

However, in some of the other consolidated cases a state court injunction was issued. In the case of *State v. Stambaugh*, No. 216,943 in the 126th Judicial District

Court of Texas, an injunction enjoined the manager of an Austin book store and movie arcade from using the premises to disseminate obscene materials. That state case and injunction was questioned in *San Antonio Book Mart, Inc., d/b/a Austin Book Mart v. Smith, et al.*, a cause filed in the United States District Court for the Western District of Texas, Austin Division, and one of the cases consolidated with *Universal* in the three-judge district court. A copy of the injunction is attached as Exhibit III to illustrate the kind of injunction entered pursuant to Article 4667(a)(3). The injunction is drawn in accordance with the Texas law in this sensitive area of prior restraint which in turn follows the law of this Court in determining the validity of such restraint. See *Moore v. Texas*, 470 S.W.2d 391 (Tex. Civ. App. - San Antonio 1971); *Richards v. Texas*, 497 S.W.2d 770 (Tex. Civ. App. - Beaumont 1973); and *Locke v. State*, 516 S.W.2d 949 (Tex. Civ. App. - Texarkana 1974).

The attached, example injunction in *State v. Stambaugh, supra*, comports with the obscenity standards of *Miller v. California*, 313 U.S. 15 (1973), adopted by Texas in *State v. West*, 489 S.W.2d 597 (Tex. Crim. App. 1973). In essence, the Article 4667(a)(3) injunction enjoins only films, books, and magazines which depict:

(1) Sexual intercourse,

(2) Oral or anal sodomy, and

(3) Bestiality

and which further:

(1) Have a dominant theme which taken as a whole appeals to the prurient interest in sex, nudity or excretion,

(2) Portray sexual conduct in a patently offensive manner, and

(3) Do not have, when taken as a whole, any serious literary, artistic, political or scientific value.

Moreover, notice should be taken that the judge in his order issued in *State v. Stambaugh, supra* indicated his refusal to enter a temporary restraining order without notice and hearing in an obscenity-oriented injunction proceeding.

An injunction in the form entered above, as required by Texas law and the decisions of this Court, presents a dubious tool for the control of obscenity. Under Texas law, the complainant must prove, after notice to a claimed violator of the injunction, all of the terms of the injunction: a depiction of sexual intercourse, sodomy or bestiality *plus* the *Miller v. California* requirements, prurient interest, patent offinsiveness and lack of serious literary, artistic, political or scientific value. See Rule 692, Texas Rules of Civil Procedure, which provides:

> Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending or with the judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting the same; and thereupon the court or judge shall cause to be issued an attachment for such person, . . . or said court or judge may issue a show cause order, directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. On return of such attachment or show cause order, the *judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction*, either directly or indirectly, may

> commit such person to jail without bail until he purges himself of such contempt, ... [Emphasis supplied]

And see *Locke v. State, supra,* wherein the Court observed, in considering a possible contempt hearing for the showing of obscenity, that:

> . . .the State will have the burden to prove that the exhibition comes within the narrow limits of the injunction. Under these circumstances there appears to be no danger that protected matter will be suppressed or that the appellant will have any doubt about the legality of his future conduct.

Thus, each alleged violation of an injunction must be shown by proof by the complainant; and the violator need only purge himself of contempt by agreeing not to exhibit or sell the offending material.

Accordingly, the injunction is not an imposing weapon with which to combat obscenity. However, the efficacy of the injunction as opposed to criminal statutes for obscenity control, is not in question in this case, but the very cumbersomeness and the ineffectualness of the injunction process illuminates the basic issue and its answer: an Article 4667(a)(3) injunction does not prohibit the dissemination of possible First Amendment materials any more than do the Texas criminal statutes, and probably less.

THE QUESTIONS ARE SUBSTANTIAL

1. The Majority Opinion of the Court of Appeals Holding That Article 4667(a)(3) Is a Per Se Violation of the First Amendment Rests on Incorrect and Inconsistent Interpretations of State and Federal Law.

The majority opinion finds fault with the temporary

injunction procedures of Texas and finds that procedural safeguards are lacking, noting that the only test applied by a Texas court at a temporary injunction hearing is the showing of a "probable right" and a "probable injury." (Majority Opinion, 587 F.2d 170) The court then observes that on appeal from the temporary injunction the Appellant cannot argue that the suppressed material is not obscene. (587 F.2d 170) This interpretation overlooks the court's own earlier citations to *Moore v. Texas, supra,* and *Locke v. State, supra,* in which the appellate courts examined the validity of the temporary injunctions on appeal in terms of obscenity standards and not merely in the framework of "probable right" and "probable injury."

The court further overlooks the enforcement procedures of the Texas law which require proof of *Miller* standards at a contempt hearing. Thus, even if the majority opinion is correct with respect to the scope of appellate review, a contempt hearing will require the Complainant to prove a full obscenity case, a situation no different than the filing of a criminal charge and a resulting trial on the charge.

The majority opinion also ignores or misinterprets vital portions of the state court opinions in *Locke* and *Richards v. State,* observing that the cases stand for the proposition that while an injunction cannot merely prohibit the future showing of "obscene films," an injunction may validly enjoin the exhibition of "films portraying acts of sexual intercourse, deviate sexual intercourse and bestiality." The majority ignores the portion of these opinions which also require that the foregoing acts generate the *Miller* requirements of (1) appeal to the prurient interest, (2) patent offensiveness and (3) the lack of redeeming social values.

The combination of enjoining the exhibition of films depicting specific acts, coupled with the requirement

that such acts come within the *Miller* criteria, mandate the conclusion that a Texas court injunction against the showing of future obscenity is no more vague than any valid state or federal criminal statute prohibiting the dissemination of obscenity. Adding in the proof requirements of any contempt hearing, the obscenity injunction constitutes no greater prior restraint than any criminal statute.

2. The Majority Opinion of the Court of Appeals is in Conflict With the Decisions of This Court Since the Opinion in Effect Refuses to Countenance Prior Restraint Under Any Circumstances.

The majority opinion holds:

> An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive . . . . "[t]his is the essence of censorship." (587 F.2d 169)

Apparently, the majority is condemning all prior restraint of possible First Amendment materials whatever the language of an injunction (or ordinance or statute) and regardless of the procedures required for proving violations of the injunction (or ordinance or statute).

This holding is not in accordance with the decisions of this Court which have recognized that prior restraint is permissible in certain situations. *Near v. Minnesota*, 283 U.S. 697 (1931); *Kingsley Books v. Brown*, 354 U.S. 436 (1957); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Time Film Corporation v. City of Chicago*, 365 U.S. 43 (1973); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546.

This Court observed in *Southeastern Promotions* that a system of prior restraint is permissible if:

> . . . it takes place under procedural safeguards designed to obviate the dangers of a censorship system. 420 U.S. at 559.

The procedural safeguards are present in the Texas injunctive process.

The decision of the Court of Appeals should be reversed as being inconsistent with the decisions of this Court.

3. The Award of Attorneys' Fees to the Prevailing Parties Raises a Substantial Question.

The Court of Appeals in finding Article 4667(a)(3) unconstitutional made the following ruling with respect to attorneys' fees:

> Accordingly, we remand the case to the managing judge of the district court with directions to set reasonable attorneys' fees in accordance with the standards established in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5 Cir. 1974).

This determination raises substantial questions of fact and law. Twenty cases were consolidated under the umbrella of one three-judge court presenting different issues and with the parties to the various cases taking different positions as to the law involved. Different cases involved different attorneys for both plaintiffs and defendants, and some parties, once these cases were consolidated, were forced into areas of litigation not originally contemplated.

The lead case, *Universal Amusement Co. v. Vance*, has long been settled. In *King Arts Theatre, Inc. v. McCrea*,

no injunction was even issued against *King Arts*, yet attorneys' fees will apparently be levied against *George E. McCrea*, the County Attorney who once contemplated the seeking of an injunction against *King Arts Theatre*.

A decision by this Court reversing the Court of Appeals determination that Article 4667(a)(3) is unconstitutional, which Appellants strongly urge, will avoid the complicated and prolonged business of making an equitable award of attorneys' fees in this cause.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of general public importance. The Appellants pray that the judgment below, holding Article 4667(a)(3) to be unconstitutional, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, hereby certify that two copies of the above and foregoing Jurisdictional Statement have been served by placing same in the United States mail, postage prepaid, certified, on this the ____ day of April, 1979, to each of the following: Frierson M. Graves, Jr., 2020 First Tennessee Building, Memphis, Tennessee 38103; and Gerald Goldstein, 2900 Tower Life Building, San Antonio, Texas 78205.

LONNY F. ZWIENER

UNIVERSAL AMUSEMENT COMPANY, INC., et al., Plaintiffs-Appellees,

v.

Carol VANCE et al., Defendants,

State of Texas, Defendant-Appellant.

Richard C. DEXTER, Plaintiff-Appellee,

v.

Ted BUTLER, District Attorney of Bexar County, Texas, et al., Defendants-Appellants.

SOUTHLAND THEATRES, INC., et al., Plaintiffs-Appellees,

v.

Ted BUTLER, District Attorney of Bexar County, Texas, et al., Defendants-Appellants.

No. 75-4312.

United States Court of Appeals, Fifth Circuit.

Sept. 28, 1977.

In three cases involving challenges to Texas statutes dealing with showing of obscene films and actions taken by local officials under other statutes against motion picture theaters, a three-judge District Court for the Southern District of Texas, John V. Singleton, Jr., J., 404 F.Supp. 33, entered judgment and appeals were taken. The Court of Appeals, Gee, Circuit Judge, held that: (1) statute authorizing suits to enjoin a nuisance, and if an establishment is adjudged a nuisance, providing for closing of establishment for one year, is inapplicable to premises used for exhibiting obscene material; (2) statute authorizing injunction after judicial determination that obscene material has been shown or distributed or manufactured on premises does not constitute a prior restraint; (3) statute creating the felony offense of possessing a "criminal instrument" does not apply to film projector used to exhibit obscene film; (4) seizure of theater's projector provided substantial support for finding of harassment and prosecution in bad faith; (5) hearings conducted at theater substantially approximated adversary hearing where theater operator was given notice and an opportunity to be heard on question of obscenity and was advised that he could bring counsel to the proceedings; (6) as an evidentiary hearing might be necessary, court would remand case to district court for determination and award of attorney fees.

Reversed and rendered in one case; affirmed and remanded in second case.

Thornberry, Circuit Judge, dissented in part and concurred in part and filed opinion.

1. Nuisance ⇐80

Statute authorizing suits in name of state to enjoin a nuisance and providing a one-year closing remedy for establishment adjudged a nuisance is inapplicable in actions involving exhibition of obscene films; statute authorizing injunction against the commercial manufacture, distribution or exhibition of obscene material provides the exclusive procedure for abating obscene exhibitions as nuisances. Vernon's Ann.Civ.St. arts. 4664–4667(a)(3); U.S.C.A.Const. Amend. 1.

2. Nuisance ⇐77

The attachment of the name "nuisance" to list of enjoinable activities in statute pertaining to commercial manu-

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APPENDIX I

facture, distribution or exhibition of obscene matter was not intended to key in the remedies of statute providing for one-year shutdown of establishment adjudged a nuisance. Vernon's Ann.Civ.St. arts. 4664, 4666, 4667(a); U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐90.1(8)
Nuisance ⇐60

Statute authorizing an injunction against the commercial manufacture, distribution or exhibition of obscene material after a judicial determination that obscene material has been shown or distributed or manufactured on premises does not constitute a prior restraint. Vernon's Ann.Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1.

4. Nuisance ⇐60

The penal code definition of "obscene" is referable to statute authorizing injunction against the commercial manufacture, distribution or exhibition of obscene material. Vernon's Ann.Civ.St. art. 4667(a)(3); V.T.C.A., Penal Code, § 43.21.

5. Nuisance ⇐80

Texas statute authorizing injunction against the commercial manufacture, distribution or exhibition of obscene material authorized restraint of such expression only as is not constitutionally protected and is prohibited by state law. Vernon's Ann.Civ.St. art. 4667(a)(3); V.T.C.A., Penal Code, §§ 43.21, 43.23; Rules of Civil Procedure, rule 683; U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐90.1(1)

The term "final" as used in United States Supreme Court decision requiring the assurance of a prompt final judicial determination whether material is unprotected after the imposition of any restraint prior to judicial review bears the sense of supervening and does not refer to whether the judicial action taken is itself subject to further judicial consideration and possible reversal. Vernon's Ann.Civ.St. art. 4667(a)(3); V.T.C.A., Penal Code, §§ 43.21, 43.23; Rules of Civil Procedure, rule 683; U.S.C.A.Const. Amend. 1.

7. Burglary ⇐12

Texas statute creating the felony offense of possessing a "criminal instrument" applies to such items as jimmies and safecracking tools; a film projector used to exhibit allegedly obscene films does not come within the statute. V.T.C.A., Penal Code, §§ 16.01, 43.23.

See publication Words and Phrases for other judicial constructions and definitions.

8. Courts ⇐508(7)

Seizure of theater's projector on ground that use of projector to exhibit allegedly obscene film rendered it a "criminal instrument," and arrest of theater operator who was under bond, provided substantial support for finding of harassment and prosecution in bad faith. V.T.C.A., Penal Code, § 16.01; Vernon's Ann.C.C.P. arts. 18.18, 23.03(a).

9. Obscenity ⇐5

A temporary ban on a film is permissible as long as there is the requirement of a prompt adversary hearing at the state's initiation. U.S.C.A.Const. Amend. 1.

10. Obscenity ⇐5

Adversary hearings, in the context of determining probable obscenity, need not be full-dress trial although the hearings must focus searchingly on the question of obscenity.

11. Obscenity ⇐5

Hearings conducted at theater at which allegedly obscene film was being

exhibited substantially approximated adversary hearings where theater operator was given notice and an opportunity to be heard, was advised that he could bring counsel and was invited to cross-examine the testifying officer and to introduce evidence.

12. Obscenity ⇐5

Theater operator cannot object to an insufficiency which is of his own making in a hearing to determine probable obscenity. V.T.C.A., Penal Code, §§ 16.01; Vernon's Ann.C.C.P. art. 18.18; U.S.C.A. Const. Amend. 1.

13. Federal Courts ⇐953

Since parties to action challenging statutes dealing with showing of obscene films and actions taken by local officials against motion picture theaters agreed to appeal from judgment of three-judge panel, even though the Supreme Court had vacated the panel's judgment for want of jurisdiction, inasmuch as costs would be determined with reference to what happened at the trial level, the managing judge of the three-judge court should hear the case on remand for determination and award of costs and attorney fees. 42 U.S.C.A. §§ 1981–1986, 1988.

14. Federal Civil Procedure ⇐2743

Court of Appeals has discretion to award costs and fees arising out of an appeal. 42 U.S.C.A. §§ 1981–1986, 1988.

15. Civil Rights ⇐13.17

County criminal district attorney and city's police chief were subject to awards of costs and attorney fees in suit for bad faith confiscation of theater's film projector even though case was pending when Congress revised Civil Rights Act by authorizing awards of legal expenses. 42 U.S.C.A. §§ 1981–1986, 1988.

16. Civil Rights ⇐13.17

The Attorney's Fees Award Act of 1976 was intended to allow fee awards in pending cases unless the awards were "manifestly unjust." 42 U.S.C.A. §§ 1981–1986, 1988.

17. Civil Rights ⇐13.8(1)

Although the Attorney's Fees Award Act of 1976 was intended to lift the veil of immunity from state and local governments to a limited degree, the Act does not change rules governing individual immunity for unconstitutional acts committed by a person acting in official capacity. 42 U.S.C.A. § 1988.

18. District and Prosecuting Attorneys ⇐10
Officers ⇐114

If the district court decides to award fees against persons in their individual capacities, it must respect the absolute immunity from money damages enjoyed by prosecutors as well as the qualified, good-faith immunity possessed by other government officials. 42 U.S.C.A. § 1988.

Appeals from the United States District Court for the Southern District of Texas.

Before THORNBERRY and GEE, Circuit Judges, and MARKEY,* Chief Judge.

GEE, Circuit Judge:

Presented with a number of requests for appointment of three-judge district courts to hear challenges to Texas statutes dealing with obscenity, the Chief Judge of this circuit consolidated all such

* Of the United States Court of Customs and Patent Appeals, sitting by designation.

cases for trial before one three-judge district court in Houston. The managing judge of that court attempted to simplify its Brobdingnagian task by choosing and setting for trial those three of the twenty consolidated cases which seemed to represent adequately the challenges of the remaining cases while presenting the fewest possible jurisdictional problems. We consider today the appeals from the district court's orders in two of these cases, 404 F.Supp. 33.[1]

I. KING ARTS THEATRE, INC. v. McCREA

The King Arts Theatre is an indoor, adults-only theater showing sexually explicit motion pictures in San Angelo, Texas. This lawsuit germinated from an apparently informal communication by the county attorney to the theater's landlord informing him that he would bring suit to enjoin future showings of pornographic films. The attorneys for the landlord then wrote to the owners of King Arts telling them of the impending suit and giving notice of termination of the theater's lease.[2] Shortly thereafter King Arts filed this suit seeking injunctive and declaratory relief from any action by the county attorney under the Texas statutes. The case was transferred to the three-judge court in Houston, and all parties agreed to stay their hands until the case could be decided.

That court concluded that *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), did not preclude granting the requested relief since no prosecution, civil or criminal, was pending. It also found, however, that prosecution under the Texas nuisance statutes would not cause irreparable injury and, so finding, declined to grant injunctive relief. It determined that Texas courts would construe the phrase "obscene material" in the applicable Texas nuisance statute[3] as the phrase was defined in Tex.Penal Code Ann. § 43.21 (Supp.1976), and upheld that definition against a claim of unconstitutional vagueness. Finally, it found that article 4667(a)(3), considered with articles 4665 and 4666 (which the court considered to be "companion statutes"), was unconstitutional on its face because it operated as an invalid prior restraint on the distribution of materials not yet judicially determined to be obscene. King Arts has not appealed from the denial of injunctive relief or the upholding of the Texas definition of obscenity.

[1] Our reading of the Texas nuisance statutes, articles 4664–67, dictates for us a narrower inquiry than that undertaken by the district court. Article 4666[4] provides for suits in the name of the State of Texas to enjoin a nuisance, and if an establishment is adjudged a nuisance under article 4666 there follows the rather draconian mandatory remedy of closing "said house . . . for one year from the date of said judgment," unless the owner provides a one- to five-thousand-dollar penal bond against future violations of the nuisance laws. The district court found that utilizing article 4666 to close a theater for showing obscene films "prevents the dissemination of that which is presumed to be legal and protected by the first amendment," that is, nonobscene films, as a concomitant of "preventing the dissemination of the unwholesome." 404 F.Supp. at 45. We agree that closing a theater under article 4666 for *all* uses for one year—even ameliorated by the provision for reopening under bond—would pose serious first amendment questions.[5] Such questions are not posed here, because we find article 4666's one-year closing remedy wholly inapplicable in actions such as this, since we read article 4667(a)(3)'s injunctive remedy as the exclusive procedure for abating obscene exhibitions as nuisances.

We note first that apparently no reported Texas cases have applied—or discussed the application of—the one-year abatement to premises used for manufacturing, distributing or exhibiting obscene material.[6] We thus write on a clean slate and must determine how Texas courts would interpret these nuisance statutes. Both article 4667 and articles 4664–66 have been on the Texas statute books since early in this century, but it was not until the 1973 amendment of article 4667 that obscenity was brought within the purview of either statute.

1. The third was not appealed.

2. The district court asserts that this letter stated that the lease termination was at the county attorney's suggestion. 404 F.Supp. at 38. As the letter appears in the record before us, we find no such representation; the letter states only that the termination was to avoid the inconvenience and embarrassment of joinder as a defendant in a suit to enjoin the showing of pornographic films.

3. Tex.Rev.Civ.Stat.Ann. art. 4667(a)(3) (Supp. 1976):

> (a) The habitual use . . . of any premises . . . for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof;
>
> . . . . . .
>
> (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material . . . .

4. Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State in the county where such conditions are violated, all such suits to be brought by the district or county attorney of such county.

5. *Compare 106 Forsyth Corp. v. Bishop*, 362 F.Supp. 1389 (M.D.Ga.1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S.Ct. 2660, 45 L.Ed.2d 696 (1975), finding no first amendment violation in the revocation of a movie theater's license for up to twelve months after a determination at a prior adversary hearing that obscene films had been shown, *and Grove Press, Inc. v. Flask*, 326 F.Supp. 574 (N.D.Ohio 1970) (three-judge court), *vacated and remanded for further consideration in light of intervening decisions*, 413 U.S. 902, 93 S.Ct. 3026, 37 L.Ed.2d 1013 (1973), upholding state nuisance statutes which provided for voiding of leases and closing of establishments for up to one year after a full adversary hearing and determination that obscene movies had been exhibited, *with Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994, 998 (S.D.N.Y.1972) (dictum) ("To permit the suspension of operation of a theatre on the basis of a prior conviction even for obscenity, amounts to an unconstitutional suppression of protected freedom of expression.").

6. Indeed, we find no indication in the record that the county attorney contemplated any remedy other than an injunction against the showing of obscene movies. So far as we can tell, the question of the one-year abatement was introduced by King Arts' pleadings, not by the county attorney.

Article 4664[7] defines three types of establishments as "common nuisances," the proprietor of which is guilty of "maintaining a nuisance": gambling houses, houses of prostitution, and places where intoxicating liquors are kept [the latter now being construed primarily as referring to places where liquor law violations take place. *State v. Parker*, 147 Tex. 57, 212 S.W.2d 132, 133 (1948)]. The language of article 4666 appears to refer back to article 4664 to explain what constitutes a nuisance: "Such a nuisance," "such nuisance," "said nuisance," "the acts prohibited in this law." Reinforcing this construction is the fact that articles 4664–66 were enacted by one bill and as one law. Tex.Laws, 2d Called Sess. 1923, ch. 24 at 57–58, and in this original pre-compilation form the references from section 4 (now article 4666) to section 1's (now article 4664's) definition of "nuisance" were even more stark, including references to the "county where the *above* nuisance is alleged to exist," for example, and to a penal bond "conditioned that the *acts prohibited in section 1 of this Act* shall not be done . . ." With the 1923 recompilation of the Revised Civil Statutes, article 4667 came into being, combining several previous statutes providing for injunctive relief against gaming establishments, bawdy houses and "bucket shops," but it was placed (obviously) *after* the rearward-looking article 4666 with its one-year abatement remedy. Article 4667 did *not* denominate its various injunction-worthy activities as nuisances, so that an activity within the purview of article 4667 clearly was not subject to article 4666's one-year closing unless it also was an activity (i. e., gambling or prostitution) made a "common nuisance" by article 4664.

[2] The same 1973 amendment which brought the commercial manufacture, distribution or exhibition of obscene matter within the coverage of article 4667 also complicated the picture by inserting, for the first time, the word "nuisance" in article 4667:

> (a) The habitual use . . . of any premises, place or building or part thereof, for any of the following uses shall constitute a *public nuisance* . . . .

(emphasis added). But merely attaching the name "nuisance" to article 4667(a)'s list of enjoinable activities was not intended, we believe, to key in the remedies of article 4666. Had the legislature intended to apply the one-year closing sanction to pornographers' establishments, it could have more clearly signalled such an intent by adding to article 4664[8] appropriate language listing such obscenity-purveying establishments among the few "common nuisances" clearly subject to abatement under article 4666. Perhaps the legislature foresaw the constitutional implications of shutting a communication-oriented business to *all* forms of expression, and to

7. Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons habitually resort for the purpose of prostitution or to gamble as prohibited by the Penal Code, is hereby declared to be a common nuisance. Any person who knowingly maintains such a place is guilty of maintaining a nuisance.

8. Which was also amended in 1973. The 1973 amendments to both articles 4664 and 4667 were part of a much larger bill enacting a new Texas Penal Code.

avoid potential trenching upon the first amendment, chose to authorize only the lesser constraint of an injunction against future exhibitions of unprotected obscene matter[9] by making article 4667, rather than article 4666, applicable to obscenity distribution. Whatever the legislature's motive, we think that even after the 1973 amendments article 4666 still refers solely to the nuisances defined in article 4664 and therefore that the district court in passing on the Texas nuisance statutes unnecessarily considered the effect of a one-year shutdown not authorized by Texas law.[10]

[3–5] This feature aside, we think article 4667(a)(3)'s injunctive procedure basically sound in its application to establishments such as King Arts. The statute authorizes an injunction against the commercial manufacture, distribution or exhibition of *obscene* material only. Because the injunction follows, rather than precedes, a judicial determination that obscene material has been shown or distributed or manufactured on the premises and because its prohibitions can apply only to further dealings with obscene and unprotected material, it does not constitute a prior restraint. Were a Texas court to issue an overbroad injunction restricting nonobscene (and therefore protected) matter, it would exceed both its constitutional and its statutory authority. While we might not be willing to assume with appellants that every state trial court granting an injunction on the authority of article 4667(a)(3) will draw up a lengthy order specifically enumerating the explicit details of the conduct prohibited, neither will we predict overly broad injunctions affecting protected expression. As we have noted, the district court correctly looked to section 43.21 of the Texas Penal Code for the definition of "obscene" referable to article 4667(a)(3) and found that section 43.21's definition, as construed by Texas courts, met or exceeded constitutional requirements as set down in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). An injunction which infringed first amendment rights would therefore necessarily exceed the court's authority under article 4667(a)(3); state appellate courts presumably stand ready to overturn orders which contravene either state statutes or the federal constitution. And a proprietor enjoined by an order proper under article 4667(a)(3) is prohibited from doing only that which he could not lawfully do anyway, since Texas law prohibits him from commercially exhibiting, possessing for sale, or distributing obscene material. Tex.Penal Code Ann. § 43.23(a)(1) (1974). A lawful injunction subjects him to no further guesswork, in determining what is and is not prohibited, than he must already engage in merely to comply with Texas law.[11] In

9. *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

10. For the same reasons the district court's understandable concern about article 4665, which elevates proof that prohibited acts are committed in a place to the status of prima facie evidence that the proprietor knowingly permitted them to occur and permits proof that a house is such a nuisance by evidence of its general reputation, was similarly misplaced. Like article 4666, article 4665 seems to look to article 4664—speaking, for example, of "proof that any of *said prohibited acts* are committed in any of *said places*"—and was enacted contemporaneously with article 4664 as part of the same bill. Under our reading, article 4665 is unavailable in actions to enjoin the exhibition of obscene materials and need not be considered by us.

11. Under Texas law the injunctive order must "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ." Tex.R.Civ.P. 683.

short, as we read the Texas statutes, they authorize restraint of such expression only as is not constitutionally protected and is prohibited by state law. This is not the stuff of which first amendment violations are made.

Finally, we note that in concluding its opinion the court below expressed doubts about the validity of certain Texas procedural rules when applied in the context of obscenity.[12] Their defect is said to be a failure to provide for a prompt "final" judicial determination of whether matter is obscene or not *after* the issuance of temporary injunction, since a temporary injunction is by definition not a final order. This is said to be required by the Supreme Court's observation in *Freedman v. Maryland*, 380 U.S. 51, 58–59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), reiterated in *Southeastern Productions v. Conrad*, 420 U.S. 546, 560, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448 (1975), that where obscenity questions are to be dealt with:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

(original emphasis). But we do not think this passage bears the sense which the court below sought to place upon it, for the context of *Freedman* and of *Conrad*, in which these words were spoken, is quite different from the present one.

[6] Under the Maryland scheme considered in *Freedman*, questioned material is drawn before the court only after and because of an earlier determination by an administrative board that it is obscene. The same was true in *Conrad*, a board having refused use of a municipal theater on grounds that a musical show was obscene. And the Supreme Court's concern, in the passages fixed on by the court below in this case, was that such matter should not be left to rest indefinitely in a state of provisional, administrative condemnation, that there should be a *final judicial* determination of its quality as obscene or not—as contrasted with the obtaining *tentative administrative* determination—within a short and definite period of time after its administrative interdiction. Thus the term "final" as used in *Freedman* and again in *Conrad* bears the sense of *supervening* and does not refer, as the lower court appears to have believed, and to whether the judicial action taken is itself subject to further judicial consideration and possible reversal.[13]

So understood, then, this passage from *Freedman* does not condemn or even

An order which enjoins the exhibition of obscene material, as the term is defined in the Penal Code, and provides no further guidelines is invalid under Texas Rule 683, wholly apart from first amendment considerations. *Richards v. State*, 497 S.W.2d 770, 778 (Tex.Civ. App.—Beaumont 1973, no writ).

12. As it happens, these rules—primarily Texas Rules of Civil Procedure 680 and 681—are copied, with minor textual changes not relevant here, from Federal Rule 65. This circumstance, while of course it does not render the Texas rules inviolate, does lend a certain extension and moment to the court's remarks expressing doubt about their propriety.

13. It is true that in *Freedman* the Court spoke of a "final judicial determination," though the context is a reference to "[a]ny restraint imposed in advance of" such a determination. 380 U.S. at 59, 85 S.Ct. at 739. But on the preceding page, the phrasing is "only a procedure requiring a judicial determination suffices to impose a valid final restraint." And on the page following, the phrase is merely "prompt judicial determination."

concern such procedures as those of Texas (and our) courts by which temporary injunctions are granted or refused pending final hearings on the merits. There need be no supervening judicial hearing following the initial determination within some special, fixed period of time because the initial determination (at hearing on temporary injunction) was itself a judicial one, and there is no administrative decision to supervene. In sum, we find article 4667(a)(3) and the Texas procedures constitutional and therefore REVERSE the judgment of the district court to the contrary.

II. DEXTER v. BUTLER

On June 24, 1974, a San Antonio police officer entered the Fiesta Theater, where the film "Deep Throat" was showing. After viewing the theater's fare, the officer requested an "adversary hearing" to determine the film's probable obscenity, and, within an hour, a hearing took place at the theater itself. Among those attending the proceeding was the theater's operator, Richard Dexter, who had been advised to attend with counsel. At the conclusion of the hearing, the presiding magistrate issued a search warrant authorizing seizure not only of the film but also of the theater's projector, which the warrant characterized as a "criminal instrument" under section 16.01 of the Texas Penal Code. The complaining officer then arrested Dexter, filing charges against him for the misdemeanor offense of commercial obscenity[14] and for the felony offense of possessing a criminal instrument. This scenario was reenacted three times in the next two weeks,[15] the only variation being that, on the last occasion, the person arrested was not Richard Dexter but Wayne Walker, a theater employee.

Dexter sued in federal court, seeking an injunction against Ted Butler, Bexar County's Criminal District Attorney, and Emil Peters, San Antonio's Police Chief. The district court ruled the confiscation of the theater's projector bad-faith harassment under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), because a film projector is clearly not a "criminal instrument" within the meaning of section 16.01, a device especially contrived for criminal purposes. The court also found bad faith in the repeated seizures of the theater's film; these were held to have contravened the Supreme Court's decision in *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973). Having made these determinations, the district judges enjoined all felony prosecutions against Dexter.

Simultaneous appeals were taken here and to the Supreme Court. The Court, concluding that the case had not warranted a three-judge panel because the district court had not questioned the constitutionality of any statute, vacated the lower court's judgment, allowing entry of a new decree and perfection of an appeal to this court. The parties later

14. Section 43.23 of the Texas Penal Code sets forth the offense of commercial obscenity as follows:

> (a) A person commits an offense if, knowing the content of the material:
>
> (1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;
>
> * * * * * *
>
> (c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this Section, in which event it is a Class A misdemeanor.

15. Arrests were made on June 24, June 28, July 2 and July 6, 1974.

agreed to appeal from the original judgment in order to save time.[16]

The district court granted relief in a matter ordinarily confined to state judicial processes. *See Younger v. Harris*, 401 U.S. at 44–45, 91 S.Ct. at 750–51. The appropriateness of that action depends upon whether appellants were guilty of "harassment or prosecutions . . . in bad faith without hope of obtaining a valid conviction." *Perez v. Ledesma*, 401 U.S. 82, 85, 91 S.Ct. 674, 677, 27 L.Ed.2d 701 (1971). In deciding this question we turn first to the seizure of Fiesta Theater's projector.

[7] Section 16.01 of the Texas Penal Code creates the felony offense of possessing a "criminal instrument" which the statute defines as "anything that is specially designed, made, or adapted for the commission of a crime." As the lower court noted, the statute obviously applies to such items as jimmies and safecracking tools, the possession of which unmistakably indicates that criminal conduct is afoot. The correctness of this interpretation is confirmed by the following portion of the "Practice Commentary" that accompanies section 16.01:

> [The statute] aims at terminating incipient criminal activity, the existence of which is indicated by conduct involving a "criminal instrument." The mere possession or manufacture of things specially designed for the purpose of accomplishing a criminal objective is strong evidence of criminal intent. The instrument must be *specially* designed, made, or adapted for the commission of an offense, however; things frequently used in a crime, but which have common, lawful uses, are excluded from the purview of Section 16.01 because possession of such things alone, is conduct too ambiguous for the imposition of the criminal sanction.

(emphasis in original). Relying on the above commentary,[17] the district court read section 16.01 as clearly inapplicable to film projectors, which accommodate lawful movies as easily as obscene ones. Appellants respond that a projector has no lawful use when it carries a reel containing an obscene film. With this argument we cannot agree. Section 16.01 punishes criminal intent, and it is possession of an obscene movie that evinces an intent to display illegal material; whether one also has a projector is irrelevant. This point is underscored by article 18.18 of the Texas Code of Criminal Procedure, which dictates destruction of any "criminal instrument," as that term is defined in the Penal Code. This provision has its purpose in preventing criminal acts, a goal hardly advanced by junking theater projectors.

[8] The seizure of Fiesta Theater's projector provides substantial support for the district court's finding of harassment and prosecution in bad faith. The multiplicity of the seizures dispels the likelihood of an honest mistake to the

16. Appellants have challenged the composition of the three-judge panel because the judge who first heard the request for injunctive relief was not included on the panel as 28 U.S.C. § 2284 requires. This question was mooted when the Supreme Court vacated the three-judge court's decision and the parties agreed to appeal from the existing judgment rather than waiting for a new decree.

17. Appellants have objected that the Practice Commentary is entitled to little weight since it lacks the status of law. The objection would have more force if the commentary did more than restate the obvious meaning of § 16.01 and if the Texas Court of Criminal Appeals had not recently approved of the manner in which the lower court interpreted the statute. *See Fronatt v. State*, 543 S.W.2d 140 (Tex.Crim.App.1976).

same extent that the language of section 16.01 must have dispelled any hope of obtaining Dexter's conviction. What makes this case an even more compelling one is the district attorney's failure to seek grand jury indictments on the felony charges against Dexter, which has frustrated prompt adjudication of the propriety of state efforts to curb speech.[18] *See Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). This prosecutorial inaction also implies that law enforcement officials recognized they were acting illegally and knew they could not obtain convictions on the felony charges.

Appellants have attempted to explain their neglect in seeking grand jury indictments by blaming the district court's pretrial restraining order. This seemingly interminable order, which we can hardly call "temporary" since it was successively extended for 339 days,[19] originally enjoined Butler and Peters "from further seizures of the film 'Deep Throat' at the Fiesta Theater, San Antonio, Texas, and from arresting plaintiff [Dexter] or employees of said theater, for so long as 'Deep Throat' is showing at the Fiesta Theater." Appellants argue that securing indictments against Dexter would necessarily have entailed arresting him in violation of the court's restraining order because (1) under Texas law a capias must issue upon a grand jury indictment, and (2) Dexter's absence from the state required his arrest and extradition for trial. But the obvious design of the original restraining order was to prevent further efforts by law enforcement officials to halt the exhibition of "Deep Throat." Read in context, the order's prohibition against arresting Dexter meant that the police were to cease their raids upon the theater; it did not prevent the district attorney from taking whatever actions were necessary to carry out Dexter's prosecution. This interpretation of the order is borne out by the transcript of a conference that occurred on August 12, 1974, between both parties to this suit and Judge Singleton, the managing judge of the district court. In that conference Judge Singleton informed both the defense and the prosecution that the court would not enjoin prosecution of pending state cases.[20] This was reiterated shortly thereafter in the trial court's order of September 6, which superseded its original restraining order. The latter order retained the injunction against further

18. Appellants cite Dexter's motions for continuance in his misdemeanor trial as evidence that he was not anxious for a determination of his guilt or innocence in state court. We fail to see how these dilatory motions prove that Dexter would not have been quick to resist felony charges, something we will never know because of the district attorney's failure to obtain felony indictments.

19. The first restraining order, quoted in the text, was issued by Judge Singleton following an ex parte hearing conducted on July 29, 1974. Twelve days later the order was extended, and in an August 12 conference Judge Singleton announced that the restraining order would be successively extended, regardless of whether additional, written orders were decreed. Finally, on September 6, 1974, the court superseded its original restraining order with another one, which was to remain in effect pending disposition of the case.

20. The following conversation took place at the hearing:

> MR. BURRIS: Your honor, could I ask one question? Now, your prior temporary restraining order has not been in such language as to restrain us from prosecuting our present criminal cases. It's been an injunction against further arrests and seizures of film.
>
> THE COURT: I don't think I am going to enjoin you from prosecuting these pending criminal cases . . . .

arrests of Dexter but expressly provided that "no pending state criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases."

Even had the district attorney been in doubt about the scope of the original restraining order, we would still affirm the three-judge panel's finding of bad faith because Dexter's indictment would not have necessitated his arrest. Article 23.03(a) of the Texas Code of Criminal Procedure clearly makes issuance of a capias unnecessary when the indictee is under bond, as Dexter had been ever since his first arrest.[21] As for Dexter's alleged absence from the state, we fail to see how his flight would have prevented the district attorney from obtaining indictments against him, although it may have precluded an immediate trial. In any event, appellants have offered so little proof of Dexter's alleged out-of-state excursion that we cannot determine its duration or even whether it in fact occurred.[22] All we do know is that Dexter was arrested during the third raid on the Fiesta Theater and that he personally appeared at the trial of his misdemeanor charges, which began on November 11, 1974, four days before the district court heard arguments in this case. Dexter's whereabouts between these two dates are not shown with any clarity. Moreover, the record makes it appear very possible that the district attorney's office first received information about Dexter's absence after it had already learned the district court did not intend to enjoin prosecution of charges pending against Dexter.[23] If so, Dexter's flight could not have weighed in the decision whether to proceed with the prosecution of his felony charges.

The trial court's finding of bad faith harassment is further corroborated by the repeated seizings of the film "Deep Throat." Assuming for the moment that appellants could have temporarily barred the film's exhibition following the initial adversary hearing held at the theater, we fail to see why the district attorney did not order a single proceeding, the stated purpose of which was to determine whether "Deep Throat" should be

21. Art. 23.03 of the Code of Criminal Procedure reads as follows:

> (a) A capias shall be immediately issued by the district clerk upon each indictment for felony presented, or upon the request of the attorney representing the State, the summons shall be issued by the district clerk, and shall be delivered by the clerk or mailed to the sheriff of the county where the defendant resides or is to be found. A capias or a summons need not issue for a defendant in custody or under bond.

22. Appellants offer three items of evidence to prove that Dexter fled the state. First, they adduce an affidavit of the Chief of the Special Crimes Division of the Bexar County District Attorney's Office. This affidavit merely mentions a statement by Dexter's attorney that his client was out of the state. Second, appellants produce the transcript from a hearing on one of Dexter's continuance motions in his misdemeanor trial. In that hearing Dexter's newly retained counsel stated he did not know where his client was. Third, and least persuasive, appellants advert to that portion of the transcript from the August 12 conference with Judge Singleton in which defense counsel, Mr. Burris, describes Dexter as a "fugitive out [sic] Memphis, Tennessee."

23. Dexter's misdemeanor trial was originally set for September 16, 1974. From the record, it appears that the district attorney's office first concluded that Dexter was absent from the state when a summons for his appearance at the misdemeanor trial was returned unserved. This suggests that the prosecutor first believed that Dexter had fled the state long after the August 12 pretrial conference in which Judge Singleton advised that the restraining order did not prevent prosecution of pending cases, and perhaps even after the order of September 6, which removed any doubt on that score.

banned until a jury determination of the film's obscenity. Instead, appellants repeatedly confiscated the film, following hearings whose only avowed purpose was to decide whether police could seize evidence of a reported crime and arrest a reported misdemeanant. This conduct strongly suggests an intent to harass. *Cf. Tyrone, Inc. v. Wilkinson*, 410 F.2d 639, 642 (4th Cir.), *cert. denied*, 396 U.S. 985, 90 S.Ct. 478, 24 L.Ed.2d 449 (1969). *But see Inland Empire, Inc. v. Morton*, 365 F.Supp. 1014 (C.D.Cal.1973).[24]

Having found ample grounds for affirming the trial court's holding, we need not examine the question whether appellants' repeated seizures of Fiesta Theater's film contravened the Supreme Court's decision in *Heller v. New York*.[25] Nonetheless, since this case presents issues representative of the twenty cases consolidated before the three-judge court, we believe a brief discussion is appropriate.

Heller contains the Supreme Court's latest discussion of the necessity of holding an adversary hearing before seizing an allegedly obscene film.[26] The crux of the *Heller* opinion is this statement:

24. The district court in *Inland Empire* refused to enjoin repeated seizure of the film "Deep Throat," noting that each showing of the motion picture was a separate offense "[j]ust as a new offense subject to arrest and seizure on a valid warrant is committed every day when a putative Defendant purchases other kinds of contraband such as heroin, cocaine or other narcotics, and then possesses, distributes and sells them." 365 F.Supp. at 1017. The seizures at issue in *Inland Empire* were made pursuant to search warrants; adversary hearings did not precede the issuance of the warrants nor did they promptly follow.

> In disagreeing with the analysis of the court in *Inland Empire*, we observe the following statement:
>
> > It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband.
>
> *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211–12, 84 S.Ct. 1723, 1726, 12 L.Ed.2d 809 (1964).

25. 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

26. Twice the Supreme Court has declined to decide whether an adversary hearing must precede the seizure of obscene material pursuant to a search warrant. *See McGrew v. City of Jackson*, 401 U.S. 987, 91 S.Ct. 1221, 28 L.Ed.2d 525 (1971), *vacating* 307 F.Supp. 754 (S.D.Miss.1970) (holding pre-seizure hearing unnecessary); *Hosey v. City of Jackson*, 401 U.S. 987, 91 S.Ct. 1221, 28 L.Ed.2d 525 (1971), *vacating* 309 F.Supp. 527 (S.D.Miss.1970) (holding pre-seizure hearing unnecessary). Both cases were vacated and remanded in light of *Younger v. Harris, supra*, and *Samuels v. Mackel*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971).

> In yet another case the Supreme Court avoided deciding whether the first amendment permits issuance of an ex parte temporary injunction against the sale or display of obscene material when an adversary hearing is required within two days. *ABC Books, Inc. v. Benson*, 401 U.S. 988, 91 S.Ct. 1228, 28 L.Ed.2d 525 (1971), *vacating* 315 F.Supp. 695 (M.D.Tenn.1970) (holding injunction proper). This case was also vacated and remanded in light of *Younger v. Harris, supra*, and *Samuels v. Mackel, supra*. The Court later vacated this case again, 413 U.S. 904, 93 S.Ct. 3028, 37 L.Ed.2d 1015 (1973), this time in light of *Heller v. New York, supra*, and its companion cases: *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); *Kaplan v. California*, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); *United States v. Twelve 200-foot Reels of Super 8mm Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); *United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973); *Alexander v. Virginia*, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993 (1973).

> If such a seizure [of film solely for the purpose of preserving evidence] is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copies so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned.

413 U.S. at 493–94, 93 S.Ct. at 2795 (footnotes omitted). Thus, the Court in *Heller* held that an adversary hearing need not precede the seizure of a film, if the seizure will not significantly interfere with the film's exhibition. The district court in this case concluded, correctly, that appellants' persistent seizures of Fiesta Theater's film were a significant restraint on the continued exhibition of "Deep Throat" and then ruled that a course of seizures such as this was invalid absent a prior adversary hearing. Since the lower court found that the probable cause hearings conducted at the theater were not "adversary hearings," it therefore declared the seizures unlawful.

[9] Language in the district court's opinion suggests it believed that a film cannot be banned even temporarily before a trial on the merits.[27] If this is what the court meant to say, we do not agree, for in *Heller* the Court clearly contemplated pretrial adversary hearings. *See* 413 U.S. at 490, 93 S.Ct. at 2793–94. Moreover, in the recently affirmed case of *Freedman v. Maryland, supra*,[28] the Supreme Court held that a film's exhibition can be temporarily restrained even without a prior adversary hearing if specific procedural safeguards are observed. Since the *Heller* Court discussed *Freedman* approvingly,[29] we must conclude that a temporary ban on a film is permissible as long as there is the requirement of a prompt adversary hearing at the state's initiation.[30] Two other

27. In commenting upon the sufficiency of the probable cause hearings conducted at the Fiesta Theater, the court stated:

> The fact that the magistrate notified the attorney and gave him the opportunity to appear at a "hearing"—which consisted of nothing more than the testimony of the police officer and the viewing of the film [sic] does not transform San Antonio's procedures into an adversary hearing, *the results of which would have the force and effect of a final adjudication of obscenity.*

404 F.Supp. at 49 (emphasis added).

28. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

29. 413 U.S. at 489–90, 93 S.Ct. at 2793. *See also McKinney v. Alabama*, in which the Court cited *Freedman* and *Heller* in tandem, describing them as cases establishing procedures sensitive to first amendment freedoms. 424 U.S. 669, 673, 96 S.Ct. 1189, 1193, 47 L.Ed.2d 387 (1976).

30. Despite *Freedman v. Maryland*, it is still theoretically possible to argue that an adversary hearing must *always* precede the imposition of even a temporary ban on a film. The *Freedman* case can be distinguished as involving a temporary restraint imposed before a film is exhibited; when a film is seized during its exhibition, one can contend that a greater procedural protection should be provided since greater disruption of a theater's operations ensues. On several occasions the Supreme Court has given weight to business considerations in determining the validity of procedures by which film exhibitions are stopped. *See Roaden v. Kentucky*, 413 U.S. 496, 503–04, 93 S.Ct. 2796, 2801, 37 L.Ed.2d 757 (1973). Specifically has the Court noted a theater operator's need for planning a schedule of his feature films. *See Freedman v. Maryland*, 380 U.S. at 61, 85 S.Ct. at 740. Nevertheless, this argument seems foreclosed by the *Heller* Court's express approval of *Freedman* in the context of discussing procedures that must be followed when law enforcement officials seize films then being exhibited.

> A further argument can be made supporting the proposition that adversary hearings must be held before any restraint is imposed on a film's exhibition. In *A Quantity of Copies of Books v. Kansas, supra*, the Court held that a judicial determination of obscenity in an adversary proceeding is necessary before officials can seize large quantities of books for the sole purpose of destroying them. *See also Marcus v. Search Warrants of Property*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). In *Heller v. New York* the Court, through Chief Justice Burger, reaffirmed *A Quantity of Books*, noting its applicability in any case involving a "large-scale seizure of books, films, or other materials presumptively protected under the First Amendment." 413 U.S. at 491, 93 S.Ct. at 2794. In the case that next appears in Volume 413 of the United States Reports, *Roaden v. Kentucky, supra*, the Chief Justice, again speaking for the Court, stated that "[s]eizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a book store." 413 U.S. at 504, 93 S.Ct. at 2801. Juxtaposing these passages, one can argue that *A Quantity of Books* applies to any restraint placed upon a film then being shown. What this argument fails to take into account is the *Heller* Court's emphasis on the purpose of the seizures in both *A Quantity of Books* and *Marcus v. Search Warrants*—namely, the destruction of the seized material. A seizure for this purpose would require a prior adversary hearing, since a hearing held after the material's destruction would be useless. The same is not true of a hearing promptly following the imposition of a temporary restraint on a film's exhibition. *Cf. United States v. Pryba*, 163 U.S.App.D.C. 389, 502 F.2d 391, 405 (1974), *cert. denied*, 419 U.S. 1127, 95 S.Ct. 815, 42 L.Ed.2d 828 (1975) (noting that seizure "solely for the purpose of destruction" demands greater procedural safeguards than does seizure "with a view to absolute suppression"); *G. I. Distributors, Inc. v. Murphy*, 490 F.2d 1167 (2d Cir. 1973), cert. denied, 416 U.S. 939, 94 S.Ct. 1941, 40 L.Ed.2d 290 (1974) (upholding prehearing seizure of 19,000 copies of publications pending adversary hearing on the following morning).

circuits agree with our reading of *Heller*. In *United States v. Pryba*, 163 U.S.App. D.C. 389, 502 F.2d 391 (1974), *cert. denied*, 419 U.S. 1127, 95 S.Ct. 815, 42 L.Ed.2d 828 (1975), the D.C. Circuit stated that pre-seizure hearings are necessary when large quantities of allegedly obscene material are confiscated for the sole purpose of destruction but expressly sanctioned post-seizure hearings in other cases. 502 F.2d at 405. And in *G. I. Distributors, Inc. v. Murphy*, 490 F.2d 1167 (2d Cir. 1973), *cert. denied*, 416 U.S. 939, 94 S.Ct. 1941, 40 L.Ed.2d 290 (1974), the Second Circuit, speaking through Judge Lumbard, upheld a prehearing seizure of 19,000 copies of publications because the state had conducted an adversary hearing on the morning following the confiscation.[31] Judge Lumbard specifically rejected the argument that the *Heller* opinion "condemned all prehearing seizures, except those in which a limited number of copies of the allegedly obscene materials are seized solely for evidentiary purposes." 490 F.2d at 1168.

[10–12] Finally, we turn to the lower court's ruling that the adversary hearings afforded Dexter were constitutionally insufficient. In response to this finding, we wish to restate established law. Adversary hearings, in the context of determining probable obscenity, need not be full-dress trials, *see Tyrone, Inc. v. Wilkinson*, 410 F.2d at 642; *Sims v. Dial*, 350 F.Supp. 747 (W.D.Tex.1972);

31. The *Murphy* case reinstated the court's former decision, which the Supreme Court had vacated and remanded in light of *Heller v. New York* and its companion cases. *See* 413 U.S. 913, 93 S.Ct. 3056, 37 L.Ed.2d 1033 (1973).

Miske v. Spicola, 314 F.Supp. 962 (M.D. Fla.1969), although it is now axiomatic that hearings must "focus searchingly on the question of obscenity." *Marcus v. Search Warrants*, 367 U.S. 717, 737, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961). The Supreme Court's decision in *Heller v. New York* gives perhaps more concrete guidance by likening an adversary proceeding to a hearing on a pretrial motion, 413 U.S. at 490–91, 93 S.Ct. at 2794, which implies notice and an opportunity to be heard as minimum requirements. We do not understand the *Heller* Court, however, to prescribe identical procedures for adversary hearings on both pretrial motions and questions of probable obscenity. One difference between these types of hearings is that a proceeding to determine probable obscenity may properly be held on rather short notice, since those who exhibit films of questionable legality should be prepared to defend their offerings within a relatively brief period of time. *Braha v. Texas*, 319 F.Supp. 1331 (W.D.Tex. 1970). In viewing these considerations, we believe that the hearings conducted at the Fiesta Theater substantially approximated adversary hearings, although we do not reach the precise factual question of their sufficiency. Dexter was given notice [32] and an opportunity to be heard on the question of obscenity. He was advised that he could bring counsel to the proceedings and, during the July 28 hearing, was even encouraged to do so. Dexter was also invited to cross-examine the testifying officer and to introduce evidence. At least one reason why the adversary hearings appear to have been rather summary is that Dexter did not fully participate in them. Obviously, a theater operator cannot object to an insufficiency which is of his own making in a hearing. *See United States v. Pryba*, 502 F.2d at 406. *Cf. Heller v. New York*, 413 U.S. at 490–91, 93 S.Ct. at 2794.

The judgment of the district court is AFFIRMED.

III. ATTORNEYS' FEES

[13, 14] Both Dexter and King Arts seek a remand for a determination and award of costs and attorneys' fees, the latter assessment being authorized by the Attorney's Fees Award Act of 1976, Pub.L. 94–559, 90 Stat. 2641 (1976), which revised 42 U.S.C. § 1988 to permit awards of legal expenses to prevailing parties in suits brought under the Civil Rights Acts, 42 U.S.C. §§ 1981–86.[33] King Arts has not prevailed and is, of course, not entitled to such relief. We remand Dexter's case with directions for the trial court [34] to set reasonable attorneys' fees in accordance with the standards set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and reaffirmed in *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977). Although we have discretion to award costs and fees arising out of an appeal to this court, *see Moten v. Bricklayers International Union*, 177 U.S.App. D.C. 77, 543 F.2d 224, 240 (1976); *Globe Life & Accident Insurance Co.*, 402 F.2d 295 (5th Cir. 1968), considerations of judicial economy call for the district court to determine the total award in this case, *see Panior v. Iberville Parish School Board*, 543 F.2d 1117, 1120 (5th Cir. 1976), especially since an evidentiary hearing may be necessary, *see Moten v. Bricklayers International Union, supra* at 240.

[15–18] Appellants Butler and Peters contend that they are not subject to such awards because this case was pending when Congress revised section 1988, but we have disposed of that contention in *Rainey v. Jackson State College, supra*. As the *Rainey* court observed, the legislative history of the Attorney's Fees Act makes plain Congress' intent to allow fee awards in pending cases unless the awards are "manifestly unjust." [35] 551 F.2d at 676. We do not consider them to be so in this case.

A more difficult question is, against whom can the district court direct its award? Again, we consult the legislative history that accompanies Congress' revision of section 1988:

> As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases [inter alia, cases brought under the Civil Rights Acts, 42 U.S.C. §§ 1980–86] are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity,[7] from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S.Rep. No. 94–1011, 94th Cong., 2d Sess. 5 & n. 7, *reprinted in* [1976] U.S.Code Cong. & Ad.News pp. 5908, 5913 (footnote omitted). Although, as the above passage makes clear, Congress intended to lift the veil of immunity from state and local governments to this limited degree,[36] the last sentence in the passage makes it equally clear that the Attor-

32. Dexter was given notice one-half hour before the hearing that took place on June 28 and one hour before the July 2 proceeding. On the first occasion the presiding magistrate expressed willingness to delay the hearing if Dexter so desired. We do not determine the factual question whether Dexter received adequate notice on either of these dates.

33. The relevant portion of revised § 1988 reads as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

34. Since the parties agreed to appeal from the district court judgment, and since costs must be determined with reference to what happened at the trial level, we believe that the managing judge of the three-judge court should hear this case on remand, even though the Supreme Court vacated the panel's judgment for want of jurisdiction.

35. The House Report to the Act stated that, "[i]n accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases." H.R.Rep. No. 94–1558, 94th Cong., 2d Sess. 4, n. 6 (1976). The legislation's applicability to pending cases was also noted during the floor debates. *See* 122 Cong. Rec. S17,052 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk); 122 Cong. Rec. H12,155 (daily ed. Oct. 1, 1976) (remarks of Rep. Anderson); 122 Cong. Rec. H12,160 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan); 122 Cong. Rec. H12,166 (daily ed. Oct. 1, 1976) (remarks of Rep. Ashbrook).

36. Cases so holding have relied on Congress' power under the enforcement clause of the fourteenth amendment as construed in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). *See Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Rodrigues v. Jimenez*, 551 F.2d 877 (1st Cir. 1977); *Rainey v. Jackson State College, supra*. *But see Skehan v. Board of Trustees*, — F.Supp. — (M.D.Pa.1977) (holding that the Attorney's Fee Award Act does not retract state immunity with sufficiently express language).

7. Proof that an official had acted in bad faith could also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in *Alyeska [Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)]. See *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974); *Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975).

ney's Fees Award Act does not change judicially established rules governing individual immunity for unconstitutional acts committed by a person acting in official capacity. Thus, if the district court decides to award fees against persons in their individual capacities, it must respect the absolute immunity from money damages enjoyed by prosecutors, *see Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), as well as the qualified, good-faith immunity possessed by other government officials, *see Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheur v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Consequently, any award of fees against individuals implicated in this case may require a hearing by the district court to develop facts not contained in the record, such as the scope and nature of the prosecutor's actions.[37] Likewise, awarding fees against city and state governments may require a hearing to determine such facts as whether city police were operating under the orders of state officials.

Accordingly, the lower court's judgment in *King Arts* is REVERSED, and decision is here RENDERED in accordance with our opinion. In *Butler* we AFFIRM and REMAND for further proceedings consistent with the above instructions.

THORNBERRY, Circuit Judge, dissenting in part, concurring in part:

In Part I of its opinion, the majority avoids what it admits to be "serious first amendment questions" by creating legislative intent from non-existent legislative history and by taking an abstruse view of relevant Supreme Court cases. Because a plain reading of the applicable Texas statutes and of those cases calls for a result contrary to that reached by the majority, I respectfully dissent. Moreover, while I concur in the result reached in Part II of the opinion, I cannot subscribe to the majority's use of a judicial shotgun when a small-caliber rifle would have sufficed.[1]

Taking the two portions in reverse order, I agree with the majority that bad-faith harassment in indeed "ample grounds for affirming the trial court's holding" in *Dexter v. Butler*. *Ante*, slip opinion at 6222, at ——. I would go no further, simply because such an excursion requires the Court to "decide" issues not essential to the disposition of the case before it.[2]

Part I of the opinion, however, necessitates more elaborate discussion. Article 4666 of the Texas statutes provides that upon "reliable information" that a nuisance exists, the attorney general, district attorney, or county attorney shall bring suit in the name of the State to abate or enjoin the nuisance. If the State is successful, there follows, as the majority aptly describes it, the "rather draconian remedy" of closing the premises for one year, unless the owner posts a penal bond of not less than $1,000 or

37. The Supreme Court has not resolved the thorny question whether prosecutors enjoy absolute immunity for acts other than initiating and pursuing a prosecution. *See Imbler v. Pachtman*, 424 U.S. at 430, 96 S.Ct. at 995.

1. At this point I should add that I concur in Part III of the opinion, although in my view King Arts also is entitled to a remand for a determination of attorneys' fees.

2. The majority as much as concedes that its discussion of the adversary hearing question is dictum when it states that "we do not reach the precise factual question of [the] sufficiency [of the hearing]." *Ante*, slip opinion at 6225, at ——.

more than $5,000 against future nuisance law violations. Article 4667, as amended in 1973, defines the commercial manufacture, distribution or exhibition of obscene material as a "public nuisance" and also sets forth a list of other nuisances, including gambling, prostitution, and bull fighting. The statute further provides that such activities "shall be enjoined at the suit of either the State or any citizen thereof."

In reversing the district court in *King Arts Theatre, Inc. v. McCrea*, the majority concludes that the one-year closing remedy provided in Article 4666 is inapplicable to obscenity and that the injunctive remedy under Article 4667 is "the exclusive procedure for abating obscene exhibitions as nuisances." *Ante*, slip opinion at 6214, at ——. This strained interpretation ignores the plain language of the two statutes, and the majority is forced to support its conclusion with suppositions about what the Legislature *may* have intended.[3]

In my view, Articles 4666 and 4667, taken together, allow the state to close, for one year, a theatre that has exhibited obscene films. Unless the bond is posted, the showing of *any* motion picture is punishable by contempt of court; thus, future conduct—which may fall within the purview of the First Amendment—is absolutely prohibited after a finding of undesirable and unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Of course, the theatre owner may post the bond and show films, but he forfeits that bond if one of the films he has selected is deemed obscene. The line between obscenity and protected speech is an extremely fine one, so fine that it is "dim and uncertain." *Bantam Books v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). As Justice Black pointed out:

> [N]o person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of "obscenity."

Ginzburg v. United States, 383 U.S. 463, 480–81, 86 S.Ct. 942, 952, 16 L.Ed.2d 31 (1966) (Black, J., dissenting). This particular dilemma has led Justice Brennan to observe:

> The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into suppression of the latter.

Paris Adult Theatre v. Slaton, 413 U.S. 49, 79–80, 93 S.Ct. 2628, 2645, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting). Few of us, perhaps only Justice Stewart and Kurt Vonnegut's fictional Senator Rosewater,[4] can escape from this defini-

3. For example, the majority states that "[p]erhaps the legislature foresaw the constitutional implications . . . and to avoid potential trenching upon the first amendment, chose to authorize only the lesser constraint of an injunction against future exhibitions of unprotected obscene matter . . . ." *Ante*, slip opinion at 6215–6216, at ——. This is nothing more than conjecture, for as anyone familiar with Texas government is acutely aware, there is no such thing as a "legislative history" for acts of the legislature.

4. Justice Stewart, of course, knows obscenity when he sees it. *Jacobellis v. Ohio*, 378 U.S. 184, 196–97, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring). Senator Rosewater's primary accomplishment was a statute making the publication or possession

tional quagmire, and this statutory scheme obviously encourages a theatre owner to steer wide of the danger zone by avoiding borderline films that are nonetheless protected under the First Amendment. This is self-censorship, a particularly subtle and most insidious form of censorship. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Even more troubling is the majority's conclusion that the injunctive procedure contained in Article 4667 satisfies the requirements of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), reaffirmed in *Southeastern Productions v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). The essence of these cases, as the district court pointed out, is that initial suppression of allegedly obscene material is permissible only for a brief, fixed period of time until a judicial determination is made and that final suppression is allowable only after a judicial determination of obscenity in an adversary context. The Texas injunction procedures, which would apply to an action brought under Article 4667, do not provide for a short, fixed period of time in which a final determination of obscenity can be made and are thus inadequate under *Freedman*. As the district court wrote:

> Pursuant to [Rules 680–693a of the Texas Rules of Civil Procedure], the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunction is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the [obscenity] case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation.

404 F.Supp. at 46.

The majority attempts to distinguish this process from *Freedman* by labeling *Freedman* as an "administrative" case in which the Court was dealing with a "tentative administrative determination." That is a distinction without a difference, for the Court's overriding concern in *Freedman* was the evil caused by the state's indefinite suppression of potentially protected speech without a judicial determination of whether the material is obscene. Here the evil lies in the fact that, under Texas procedure, the temporary injunction is tentative—not a ruling on the merits—and *Freedman* requires procedural safeguards that include, *inter alia*, the assurance of prompt judicial review on the merits.

Because I would affirm the district court's holding that the statutory scheme embodied in Articles 4666 and 4667 are unconstitutional insofar as they concern obscenity, I respectfully dissent from Part I of the majority opinion. I concur in the result reached in Part II, and, with the exception stated in footnote 1 of this opinion, I concur in Part III.

of obscene materials a federal offense. The statute, Vonnegut wrote, "was a masterpiece because it actually defined obscenity." The definition: "Obscenity is any picture or phonograph record or any written matter calling attention to reproductive organs, bodily discharges, or bodily hair." K. Vonnegut, God Bless You, Mr. Rosewater 85 (Delta ed. 1965).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNIVERSAL AMUSEMENT CO., INC., et al.,

v.

Carol VANCE et al.

KING ARTS THEATRE, INC., Plaintiff-Appellee,

v.

George E. McCREA et al., Defendants,

the State of Texas, Defendant-Appellant.

No. 75–4312.

United States Court of Appeals, Fifth Circuit.

Dec. 18, 1978.

Three cases involving challenges to Texas statutes relating to obscenity were consolidated, and a three-judge District Court for the Southern District of Texas, John V. Singleton, Jr., J., 404 F.Supp. 33, held, inter alia, that the Texas statutes, construed together, amounted to an unconstitutional prior restraint on the distribution of materials not yet judicially determined to be obscene. The State of Texas appealed with respect to two cases, and a panel of the Court of Appeals, 559 F.2d 1286, reversed and rendered in one case and affirmed and remanded in the other case. Thereafter, the cases were ordered reheard en banc and the Court of Appeals, en banc, Thornberry, Circuit Judge, held that: (1) the appeal was properly before the Court; (2) the Texas statute which provides that an establishment adjudged a nuisance may be ordered closed for one year was inapplicable to obscenity; (3) the Texas statute which provides that the use of any premises for the commercial manufacturing, distribution or exhibition of obscene material constitutes a public nuisance subject to injunction was unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films; (4) the Texas statute was also unconstitutional by reason of lacking required procedural safeguards, including a provision for prompt and final adjudication on the merits and (6) it was appropriate to remand to district court for a determination and award of costs and attorney fees.

Judgment of the panel of the Court of Appeals reversed and judgment of the District Court affirmed.

Gee, Circuit Judge, dissented in part and filed opinion in which Brown, Chief Judge, and Coleman, Ainsworth, Tjoflat and Vance, Circuit Judges, joined.

1. Federal Courts ⇐1142

Because appeal was from grant of declaratory relief alone, the United States Supreme Court was without jurisdiction to hear a direct appeal by the State of Texas from three-judge district court's judgment that Texas nuisance statute, as applied to materials not yet judicially determined to be obscene, amounted to an unconstitutional prior restraint; therefore, appeal was properly before the Court of Appeals. 28 U.S.C.A. § 1253; U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4664, 4666.

2. Federal Courts ⇐612

In view of fact that question of *Younger* abstention is nonjurisdictional, question was not properly before the Court of Appeals where it was not raised before district court.

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APPENDIX II

3. Constitutional Law ⇐90.1(1)

While obscenity is not protected by the First Amendment, state regulation must not be permitted to impinge upon speech that matters. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐82(6)

Corporate activities can clearly come within the First Amendment. U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐90.1(6)

Entertainment as well as news enjoys First Amendment protection. U.S. C.A.Const. Amend. 1.

6. Constitutional Law ⇐90.1(6)

Motion pictures are covered by the First Amendment; indeed, a film carries with it a presumption of First Amendment protection. U.S.C.A.Const. Amend. 1.

7. Constitutional Law ⇐90.1(4)

A statutory scheme which authorized closing for one year any establishment adjudged to be a nuisance unless the operator posted a penal bond against future violations of nuisance laws would be patently unconstitutional insofar as it was construed to allow the state to close, for one year, an establishment that had exhibited obscene films or sold obscene printed matter. U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4664, 4666.

8. Constitutional Law ⇐90(1)

A prior restraint of expression comes before the court with a heavy presumption against its constitutional validity. U.S.C.A.Const. Amend. 1.

9. Constitutional Law ⇐90.1(1)

The line between obscenity and protected speech is thin and uncertain. U.S. C.A.Const. Amend. 1.

10. Constitutional Law ⇐90.1(6)

It would constitute an impermissible prior restraint for the State of Texas to utilize its nuisance statutes to close for one year any theater that had exhibited obscene films. U.S.C.A.Const. Amend. 1; Vernon's Ann.Tex.Civ.St. arts. 4664, 4666.

11. Constitutional Law ⇐46(1)

Federal courts should refrain from passing on a constitutional question if there is an alternative ground such as statutory construction upon which the case may be decided.

12. Nuisance ⇐60

The Texas statute which provides for suits to enjoin a nuisance and which states that if an establishment is found to be a nuisance, judgment shall be rendered abating the nuisance and ordering that the nuisance be closed for one year from the date of the judgment, unless the defendants post a penal bond, was inapplicable to obscenity. Vernon's Ann. Tex.Civ.St. art. 4666; U.S.C.A.Const. Amend. 1.

13. Intoxicating Liquors ⇐259
Nuisance ⇐60

The one-year abatement procedure available under Texas nuisance statute may be constitutionally applied in cases of gambling, prostitution and liquor law violations; however, the one year abatement procedure cannot be constitutionally applied in cases of obscenity, bull fighting and live sex shows, which are covered only by any independent provision which defines certain activities as public nuisances. Vernon's Ann.Tex. Civ.St. arts. 4666, 4667; U.S.C.A.Const. Amend. 1.

14. Injunction ⇐204

Wholly apart from First Amendment considerations, an injunction prohibiting the future showing of various unnamed "obscene" films would be invalid under the Texas Rules of Civil Procedure, which require that an injunctive order be specific in terms and describe in reasonable detail the act or acts sought to be restrained. Vernon's Ann.Tex. Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1; Rules of Civil Procedure Tex. rule 683.

15. Injunction ⇐204

Under Texas law, an injunction decree must be as definite, clear and precise as possible and, when practicable, it should inform the defendant of the acts he is restrained from doing without calling on him to make inferences or conclusions about which persons might well differ. Rules of Civil Procedure Tex. rule 683.

16. Constitutional Law ⇐82(3)

Injunctions that abridge conduct protected by the First Amendment are constitutionally impermissible. U.S.C.A. Const. Amend. 1.

17. Constitutional Law ⇐90.1(1)

Obscenity is not protected speech. U.S.C.A.Const. Amend. 1.

18. Constitutional Law ⇐90.1(6)
Nuisance ⇐60

The Texas statute which defines the use of any premises for the commercial manufacturing, distribution or exhibition of obscene material as a public nuisance subject to injunction at the suit of either the state or any citizen was unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films; such a broad injunction would amount to a prior restraint on materials not yet declared obscene. Vernon's Ann.Tex.Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1.

19. Constitutional Law ⇐90.1(1)
Nuisance ⇐60

The Texas statute which defines the use of any premises for the commercial manufacturing, distribution or exhibition of obscene material as a public nuisance subject to injunction at the suit of either the state or any citizen was constitutionally infirm by reason of its failure to provide mandated procedural safeguards including a provision for a prompt and final judicial determination on the merits. Vernon's Ann.Tex.Civ.St. art. 4667(a)(3); U.S.C.A.Const. Amend. 1.

20. Statutes ⇐48(3)

Federal court can construe two state statutes as exclusive of one another in order to avoid a constitutional difficulty.

21. Constitutional Law ⇐70.1(2)

Federal court cannot judicially rewrite Texas statutes and rules in order to incorporate mandatory constitutional safeguards against First Amendment violations. U.S.C.A.Const. Amend. 1.

22. Civil Rights ⇐13.17

Attorney fees are permissible in a civil rights suit alleging violations of First Amendment rights. U.S.C.A.Const. Amend. 1; 42 U.S.C.A. §§ 1981–1986, 1988.

23. Federal Civil Procedure ⇐2743

Court of Appeals has discretion to award costs and fees arising out of an appeal.

24. Civil Rights ⇐13.17

Although Court of Appeals had discretion to award costs and fees arising out of an appeal, it was appropriate for district court to determine total award to be made to prevailing party in suit under the Civil Rights Act where the district court had reached its decision on the merits prior to the effective date of the 1976 amendment providing for such

an award. 42 U.S.C.A. §§ 1981–1986, 1988; U.S.C.A.Const. Amend. 1.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.*

THORNBERRY, Circuit Judge:

This Texas obscenity case has had a long and somewhat unusual history. Originally filed on November 12, 1973, in the Northern District of Texas under the caption *King Arts Theatre, Inc. v. McCrea*, it was subsequently consolidated by the Chief Judge of this Court with other obscenity cases pending before a three-judge court sitting in the Southern District of Texas. That court had initially been constituted to hear a single case, *Universal Amusement Co. v. Vance*, the caption of which graces this opinion.

The consolidated cases eventually mushroomed to twenty, and the three-judge court selected for trial three representative cases: *King Arts Theatre, Inc. v. McCrea*, *Dexter v. Butler*, and *Ellwest Stereo Theatre, Inc. v. Byrd*. The district court's opinion is reported under the caption *Universal Amusement Co. v. Vance*, 404 F.Supp. 33 (S.D.Tex.1975). A panel of this Court affirmed the district court's decision in *Dexter* but reversed its ruling in *King Arts Universal Amusement Co. v. Vance*, 559 F.2d 1286 (5 Cir. 1977). The *Ellwest Stereo* case was not appealed.

This court ordered the two cases reheard *en banc* and subsequently severed and renumbered them, although both will continue to carry the *Universal Amusement* caption. This opinion thus treats only the appeal in *King Arts*, No. 75–4312,[1] and for the reasons stated below, we reverse the panel and affirm the judgment of the district court.

The facts can be briefly summarized. In 1973, King Arts Theatre, Inc. was operating an indoor, adults-only motion picture theatre in San Angelo, Texas, that showed sexually explicit films. On October 30 of that year, the landlord from whom the theater building was rented gave notice to King Arts that its lease was to be terminated as of November 15. According to the notice, County Attorney George E. McCrea had informed the landlord that he intended to obtain an injunction to abate the theater as a public nuisance in order to prohibit the future showing of allegedly obscene motion pictures.

King Arts filed suit on November 12 in the Northern District of Texas seeking injunctive and declaratory relief from any action by the county attorney under the Texas nuisance statutes.[2] The case was then transferred to the three-judge court, and the parties agreed to maintain the status quo until the case could be decided. The district court found that the landlord was terminating King Arts' lease "at the suggestion" of the county attorney, and that he intended to seek an injunction based on the nuisance statutes and to pursue cancellation of the lease.[3]

The district court concluded that *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), did not preclude granting the requested relief since no prosecution—either civil or criminal—was pending. It also found that a proceeding under the nuisance statutes would not cause irreparable injury and, accordingly, declined to grant injunctive relief. Reaching the merits of King Arts' claims, the court held that Texas courts would construe the phrase "obscene material" in the applicable Texas nuisance statute as the phrase was defined in the state's penal code and upheld that definition against a claim of unconstitutional vagueness. However, the court held that the Texas nuisance statutes, construed together, constituted an unconstitutional prior restraint on the distribution of materials not yet judicially determined to be obscene. In addition, the court expressed serious doubts about the validity of the Texas injunction procedures as applied in the obscenity context.

[1] The state of Texas[4] appealed from the district court's judgment that the nuisance statutes were unconstitutional. King Arts did not appeal from the court's denial of injunctive relief or its upholding of the state's obscenity definition. Because this is an appeal from the grant of declaratory relief alone, the Supreme Court is without jurisdiction to hear a direct appeal under 28 U.S.C. § 1253, and the appeal is properly before this Court. *Gerstein v. Coe*, 417 U.S. 279, 94 S.Ct. 2246, 41 L.Ed.2d 68 (1974); *Beal v. Doe*, 432 U.S. 438, 443, 97 S.Ct. 2366, 53 L.Ed.2d 464 n.5 (1977).[5]

I.

[2–6] The only issue on appeal[6] is the constitutionality of the Texas nuisance statutes as applied to obscenity, although this question requires three separate but related inquiries. At the outset, we stress that while obscenity is not within

* Judge Morgan was a member of the en banc court under 28 U.S.C.A. § 46(c) and participated in the oral argument of the case en banc. Subsequently, the Omnibus Judgeship Bill, Public Law 95–486 (95th Congress), 92 Stat. 1629 was approved October 20, 1978. In view of this, Judge Morgan does not participate in this decision.

1. The *Dexter* case was renumbered as 75–4313, and the decision of the *en banc* Court is reported at —— F.2d —— (5 Cir. 1978).

2. Jurisdiction was based on 28 U.S.C. § 1343, the jurisdictional counterpart to 42 U.S.C. § 1983, as well as on 28 U.S.C. § 2201 (declaratory judgments).

3. As the panel opinion pointed out, nothing in the landlord's notice letter to King Arts indicates that the lease termination was at the suggestion of McCrea; rather, the letter stated that the termination was to avoid the embarrassment and inconvenience of joinder as a defendant in a suit to enjoin the showing of pornographic films. 559 F.2d at 1289 n.2. However, the district court's opinion states that the facts recited therein were "agreed to by the parties," 404 F.Supp. at 38, and neither party challenges the district court's factual findings on appeal.

4. In addition to County Attorney McCrea, the suit named as defendants Texas Governor Dolph Briscoe and Attorney General John Hill.

5. Under § 1253, any party may directly appeal to the Supreme Court from an order granting or denying an injunction in any civil action required to be heard by a three-judge court. Former § 2281, now repealed, provided that any injunction restraining the enforcement of a state statute or restraining a state official from enforcing such statute "shall not be granted . . . upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges." Because this action had been commenced before the effective date of the repealing legislation, § 2281 applied to this suit. Pub.L. 94–381, § 7; 94th Cong., 2d Sess. (1976) U.S.Code Cong. & Admin.News 1976, p. 1988.

6. Appellant did not raise the question of *Younger* abstention, and that issue, being non-jurisdictional, is thus not before this court. We note that in the instant case, there were no state proceedings pending when the suit was brought. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d. 648 (1975).

the purview of the first amendment, *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), state regulation must not be permitted to impinge upon "speech that matters." Justice Brennan eloquently expressed this important concept in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963):

> [T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools."

Id. at 66, 83 S.Ct. at 637 [citations and internal quotations omitted].[7]

[7] Our initial concern is whether the Texas statutory scheme operates as an unconstitutional prior restraint by allowing the state to close, for one year, an establishment that has exhibited obscene films or sold obscene printed matter. Although the instant case involves motion pictures, our analysis is equally applicable to printed material.

Article 4666 of the Texas Revised Civil Statutes[8] provides for suits in the name of the state to enjoin a nuisance. If an

7. We also note other principles common to our three inquiries in this case. Corporate activities can clearly come within the first amendment, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), and entertainment, as well as news, enjoys first amendment protection. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). Motion pictures are covered by the first amendment, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), and precision of regulation must be the touchstone. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 682, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). A film carries with it a presumption of first amendment protection, *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), and the courts "must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973).

8. Tex.Rev.Civ.Stat.Ann. art. 4666 provides:

> Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State in the county where such conditions are violated, all such suits to be brought by the district or county attorney of such county.

establishment is deemed a nuisance, there exists the rather Draconian remedy of closing the establishment "for one year from the date of said judgment," unless the operator posts a penal bond ranging from $1,000 to $5,000 against future violations of the nuisance laws. Article 4664[9] defines three types of establishments as "common nuisances," and the proprietor of such an establishment is guilty of "maintaining a nuisance": gambling houses, houses of prostitution, and places where intoxicating liquors are illegally kept, manufactured, sold, or given away.[10]

Article 4667[11] defines the commercial manufacture, distribution, or exhibition of obscene material as a "public nuisance" and also sets forth a list of other nuisances, including gambling, prostitution, and bull fighting. The statute further provides that such activities "shall be enjoined at the suit of either the State or any citizen thereof."

The Texas courts have not examined the relationship between Articles 4666 and 4667. *Compare State ex rel. Ewing v. "Without a Stitch,"* 37 Ohio St.2d 95, 307 N.E.2d 911, 917–18 (1974), *app. dism'd*, 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82 (1975) (interpreting one-year closing provision of state nuisance statute). The plain language of the statutes

9. Tex.Rev.Civ.Stat.Ann. art. 4664 provides:

> Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons habitually resort for the purpose of prostitution or to gamble as prohibited by the Penal Code, is hereby declared to be a common nuisance. Any person who knowingly maintains such a place is guilty of maintaining a nuisance.

10. The liquor provision has been construed as referring to places where liquor law violations occur. *See State v. Parker*, 147 Tex. 57, 212 S.W.2d 132 (1948).

11. Tex.Rev.Stat.Ann. art. 4667 provides:

> (a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:
>
> (1) For gambling, gambling promotion, or communicating gambling information prohibited by law;
>
> (2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;
>
> (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;
>
> (4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;
>
> (5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.
>
> (b) Any person who may use or be about to use, or who may be a party to the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney or City Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of.

Prior to its amendment in 1973, Article 4667 did not denominate its various injunction-worthy activities as nuisances. The 1973 amendment, which brought commercial obscenity within the statute, also added the term "nuisance."

suggests that obscenity, which is defined as a nuisance under Art. 4667, is thus subject to the one-year closing provisions of Art. 4666. So read, the statutes would be patently unconstitutional insofar as they pertain to obscenity.

[8, 9] A prior restraint of expression comes before this court with "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan, supra* 372 U.S. at 70, 83 S.Ct. at p. 639; *New York Times Co. v. United States,* 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). Read together, Articles 4666 and 4667 clearly create a prior restraint. The statutes allow the state to close, for one year, a theatre that has exhibited obscene films. Unless a bond from $1,000 to $5,000 is posted, the showing of *any* motion picture is punishable by contempt of court. Thus, future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Moreover, although a theater operator may post the bond and show films, he forfeits that bond if one of the films he has selected is deemed obscene. This statutory scheme obviously encourages a theater operator to steer wide of the danger zone by avoiding borderline films that are nonetheless protected under the first amendment. The line between obscenity and protected speech is "dim and uncertain," *Bantam Books, Inc. v. Sullivan, supra* 372 U.S. at 66,[12] 83 S.Ct. 631, and difficulty in locating that line leads to self-censorship, a particularly subtle and most insidious form of the malady. *Cf. New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (defamation).

[10] Application of the one-year closing provisions in obscenity cases under the Texas nuisance statutes would constitute an impermissible prior restraint, since the state would be "enjoin[ing] the future operation of a [business] which disseminates presumptively First Amendment protected materials solely on the basis of the nature of the materials which were sold . . . in the past." *Speight v. Slaton,* 356 F.Supp. 1101, 1107 (N.D.Ga.1973) (Morgan, J., dissenting), *vacated and remanded,* 415 U.S. 333, 94 S.Ct. 1098, 39 L.Ed.2d 367 (1974). Many courts have so held.[13]

12. As Justice Brennan has observed:

> The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into suppression of the latter.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 79–80, 93 S.Ct. 2628, 2645, 37 L.Ed.2d 446 (1973) (Brennan, J., dissenting). *See also Ginzburg v. United States,* 383 U.S. 463, 480–81, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966) (Black, J., dissenting).

13. *E. g., Sanders v. State,* 231 Ga. 608, 203 S.E.2d 153 (1974); *Gulf States Theatres of Louisiana, Inc. v. Richardson,* 287 So.2d 480 (La.1974); *General Corp. v. State ex rel. Sweeton,* 294 Ala. 657, 320 So.2d 668 (1975), *cert. denied,* 425 U.S. 904, 96 S.Ct. 1494, 47 L.Ed.2d 753 (1976); *Mitchem v. State ex rel. Schaub,* 250 So.2d 883 (Fla.1971); *People ex rel. Busch v. Projection Room Theatre,* 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, *cert. denied,* 429 U.S. 922, 97 S.Ct. 320, 50 L.Ed.2d 289 (1976); *New Riviera Arts Theatre v. State ex rel. Davis,* 219 Tenn. 652, 412 S.W.2d 890 (1967); *State ex rel. Blee v. Mohney Enterprises,* 154 Ind.App. 244, 289 N.E.2d 519 (1973); *State ex rel. Field v. Hess,* 540 P.2d 1165 (Okl.1975); *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976); *State ex rel. Ewing v. "Without a Stitch," supra; Spokane Arcades v. Ray,* 449 F.Supp. 1145 (E.D.Wash. 1978). *See generally* Edelstein & Mott, *Collateral Problems in Obscenity Regulation: A Uniform Approach to Prior Restraints, Community Standards, and Judgment Preclusion,* 7 Seton Hall L.Rev. 543 (1976); Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisances,* 14 Wake Forest L.Rev. 1 (1978); Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute,* 44 U.Chi.L.Rev. 509 (1977).

[11–13] However, the federal courts should refrain from passing upon a constitutional question if there is an alternative ground such as statutory construction upon which the case may be decided. *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); *Pugh v. Rainwater,* 572 F.2d 1053, 1058 (5 Cir. 1978) (en banc). Accordingly, we hold that the one-year closing remedy provided in Article 4666 is inapplicable to obscenity and that the injunctive remedy provided in Article 4667 is the exclusive procedure for abating obscene exhibitions as nuisances. Thus, the one-year abatement procedure can be applied in cases of gambling, prostitution, and liquor law violations, all of which are defined as nuisances in Article 4664, but not in cases of obscenity, bull fighting, and live sex shows, which are covered only by Article 4667. This reading of the statutes, while somewhat strained,[14] is not implausible, given the fact that Articles 4664–66 were enacted in one bill, prior to enactment of Article 4667, and that Article 4667 did not contain the term "nuisance" until its amendment in 1973. *See* 559 F.2d at 1291 (panel opinion).

14. We could, for example, speculate that the legislature treated obscenity only in Article 4667 because it recognized the first amendment implications of a one-year closing under Article 4666. However, if that is so, it is rather odd that the legislature chose to include live sex shows and bull fighting in the same statute as obscenity, since those two activities implicate the first amendment only in the barest fashion. *Cf. California v. LaRue,* 409 U.S. 109, 118, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972). We note that our efforts at statutory interpretation are handicapped by the lack of a legislative history of the nuisance statutes.

II.

King Arts also urges that the injunction permitted by Article 4667(a)(3) is constitutionally deficient because the state can obtain an injunction that prohibits the future showing of various unnamed "obscene" films. The district court hinted its agreement but did not discuss the matter at length in view of its disposition of the case. The panel, however, determined that the injunctive procedure was "basically sound." 559 F.2d at 1292.[15]

[14, 15] Wholly apart from first amendment considerations, such a broadly drawn injunction would be invalid under the Texas Rules of Civil Procedure, which require that the injunctive order "be specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained . . . ." Rule 683, Tex.R.Civ.P. As the Texas Supreme Court explained in *Villalabos v. Holquin,* 146 Tex. 474, 208 S.W.2d 871, 875 (1948):

> [A]n injunction decree must be as definite, clear and precise as possible, and when practicable it should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which

15. King Arts did not cross-appeal in this case, but it need not have done so in order to urge alternative theories in support of the district court's judgment that Article 4667(a)(3) is unconstitutional. *United States v. American Ry. Express Co.,* 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924); *Lowe v. Pate Stevedoring Co.,* 558 F.2d 769, 770–71 n.2 (5 Cir. 1977).

persons might well differ and without leaving anything for further hearing. *See also Ex parte Slavin*, 412 S.W.2d 43 (Tex.1967).

For example, in *Moore v. State*, 470 S.W.2d 391 (Tex.Civ.App.—San Antonio 1971, writ ref. n. r. e.), the trial court had granted a temporary injunction prohibiting the sale of certain specific magazines and books, as well as the sale of "similar" material. In holding the "similar material" portion of the injunction invalid under Rule 683, the court said:

> [The order] does not sufficiently appraise [sic] appellants of the acts they are restrained from doing. In effect, the court is passing upon the obscenity of books, magazines, newspapers and films not before it, and perhaps not now in existence; and it prohibits generally the defendants from violating a penal statute without clear, precise or definite guidelines.

470 S.W.2d at 396. Moreover, in *Richards v. State*, 497 S.W.2d 770 (Tex.Civ. App.—Beaumont 1973, no writ), the court was faced with an injunction prohibiting, *inter alia*, the exhibition and distribution of obscene material in violation of the Texas Penal Code. Relying on *Moore*, the court held this portion of the injunction invalid under Rule 683: "This facet of the decree does not even comport with our basic rules of civil procedure, much less the almost insurmountable obstacle of the First Amendment." 497 S.W.2d at 778.

However, the *Richards* decision indicates that the Texas courts are willing to uphold more specifically framed injunctions against unnamed future films or publications. Another portion of the injunction in *Richards* prohibited the defendants from "exhibiting or selling any other films which show actual acts of fellatio . . ., cunnilingus . . ., actual oral genital contact between two or more males or females, any sexual intercourse between any human and any animal or any scenes depicting actual sexual intercourse between human males and females." The court, while recognizing the first amendment problems, upheld this part of the injunction as being "specific, definite, and clear." 497 S.W.2d at 780.[16]

Similarly, in *Locke v. State*, 516 S.W.2d 949 (Tex.Civ.App.—Texarkana 1974, no writ), the trial court had issued a temporary injunction enjoining appellant from commercially exhibiting films portraying acts of sexual intercourse, deviate sexual intercourse, and bestiality as defined by Texas Penal Code §§ 21.01, 21.07. The court upheld the injunction, concluding that it was not impermissibly vague and was not a prior restraint. The court said:

> The order in question here restrains only the exhibition of films depicting specific activities conducted in a certain manner. All these activities are expressly defined by statute and have been authoritatively construed to constitute obscenity not entitled to constitutional protection. The order does not contain a blanket suppression of films vaguely labeled "obscene," and there is no suppression of films by name or any other designation except by reference to the specific conduct depicted therein.

16. The court modified the decree to incorporate the holding of *Miller v. California*, *supra*:

> The injunction granted by this paragraph of the order is limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value."

497 S.W.2d at 782.

516 S.W.2d at 954–55 [citations omitted].[17]

It thus appears that Rule 683, as interpreted by the Texas courts, would allow the issuance of an injunction against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute.[18] That is, while an injunction cannot simply forbid the showing of "obscene films," it can prohibit the showing of films that fall within the statutory definition of obscenity, so long as the prohibited acts are spelled out in the injunction. If this is the case—and the *Richards* and *Locke* decisions apparently represent the current state of the law—then we must examine such an injunction in light of the first amendment.

[16, 17] Injunctions that abridge conduct protected by the first amendment are constitutionally impermissible. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *United Transp. Union v. State Bar*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971). Although obscenity is not protected speech, "[t]he line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448 (1975). Accordingly, the Supreme Court has recognized the validity of injunctions against obscenity only when various safeguards are employed. For example, in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445, 77 S.Ct. 1325, 1330, 1 L.Ed.2d 1469 (1957), the Court upheld a New York statute, which, as authoritatively construed, "studiously withholds restraint upon matters not already published and not yet found to be offensive." Similarly, in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446 (1973), the Court emphasized that a Georgia statute imposed no restraint on the exhibition of films "until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected." No such safe-

17. The court also stressed the existence in the order of an agreed procedure by which appellant could secure a judicial determination of a film's status prior to its exhibition. This procedure, the court said, "is designed to prevent constitutionally protected material from being suppressed." 516 S.W.2d at 955.

18. Tex. Penal Code § 43.21 (Supp.1978) provides, in pertinent part:

> (1) "Obscene" means having as a whole a dominant theme that:
> (A) appeals to the prurient interest of the average person applying contemporary community standards;
> (B) depicts or describes sexual conduct in a patently offensive way; and
> (C) lacks serious literary, artistic, political, or scientific value.
> * * * * * *
> (3) "Prurient interest" means an interest in sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.
> * * * * * *
> (6) "Sexual conduct" means:
> (A) any contact between any part of the genitals of one person and the mouth or anus of another person;
> (B) any contact between the female sex organ and the male sex organ;
> (C) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl; or
> (D) patently offensive representations of masturbation or excretory functions.

guards exist under Texas law. *See, e. g., Richards v. State, supra.*[19]

An order banning the exhibition of unnamed "obscene" films would prohibit the showing of films that have not been judicially declared obscene, as well as films that may not have even been produced. Such a blanket ban is not rendered unobjectionable by the interweaving of threats of language from obscenity statutes, for the end result is a sweeping prohibition against the screening of obscene films in general. Incorporation of the statutory definition of obscenity—usually a listing of forbidden sexual acts or acrobatics—merely begs the question, for few of us have the omniscience to determine, in advance of a final judicial ruling, whether a film is legally obscene. Moreover, it is possible that a film containing many of the acts listed in the statute may eventually be held *not* to be obscene, since the work must be taken as a whole, *Miller v. California, supra,* and since state law cannot define the "contemporary community standards" that must be applied by the fact finder. *Smith v. United States,* 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977). An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. As Chief Justice Hughes wrote in *Near v. Minnesota, supra* 283 U.S. at 713, 51 S.Ct. at 630, "[t]his is of the essence of censorship."

[18] We therefore hold that Article 4667(a)(3) is unconstitutional insofar as it authorizes injunctions against the future exhibition of unnamed films. Such a broad injunction simply cannot stand, for it amounts to a prior restraint on materials not yet declared obscene. *Parish of Jefferson v. Bayou Landing, Ltd.,* 350 So.2d 158 (La.1977); *News Mart, Inc. v. State ex rel. Webster,* 561 S.W.2d 752 (Tenn.1978); *Ranck v. Bonal Enterprises, Inc.,* 467 Pa. 569, 359 A.2d 748 (Pa.1976); *Fehlhaber v. North Carolina,* 445 F.Supp. 130 (E.D.N.C.1978); *Mitchem v. State ex rel. Schaub, supra; State ex rel. Field v. Hess, supra; New Riviera Arts Theatre v. State ex rel. Davis, supra; Busch v. Projection Room Theatre, supra.*

III.

[19] King Arts also contends that Article 4667(a)(3) lacks the procedural safeguards required under *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).[20] Those safeguards were recently affirmed in *Southeastern Promotions, Ltd. v. Conrad, supra,* in which the Court summarized them as follows:

> *First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured.

19. Although some safeguards may apparently be written into an injunction, *see Locke v. State, supra* at 955 (discussed at footnote 17, *supra*), there is no *requirement* that they be included.

20. The district court expressed serious doubts about the validity of the Texas injunction procedure in the obscenity context but did not make a specific ruling in light of its disposition of the case. 404 F.Supp. at 45–46. The panel, however, upheld the procedures as constitutional. 559 F.2d at 1292–93.

420 U.S. at 560, 95 S.Ct. at 1247 [italics in original]. *See also United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 44 (1971); *Blount v. Rizzi,* 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1971).

Although *Freedman* arose in the context of obscenity determinations made by administrative bodies such as licensing boards or film commissions, its principles clearly extend to state statutes and rules governing injunctions against obscenity. *McKinney v. Alabama,* 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976); *Paris Adult Theatre I v. Slaton, supra; Grove Press, Inc. v. Philadelphia,* 418 F.2d 82 (3 Cir. 1969); *United Artists Corp. v. Wright,* 368 F.Supp. 1034 (M.D. Ala.1974) (Three-judge court); *Gundlach v. Rauhauser,* 304 F.Supp. 962 (M.D.Pa. 1969) (three-judge court).

Under the Texas injunction procedure, the trial court has broad discretion to grant or deny a temporary injunction, the purpose of which is to preserve the status quo of the suit's subject matter pending a final trial of the case on its merits. Accordingly, the trial court's decision is not a ruling on the merits of the case, but rather a determination of whether the applicant has shown a "probable right" and a "probable injury." In carrying this burden, the applicant is not required to establish that he will finally prevail in the litigation. The judgment of the trial court will be upheld unless the appellate court is convinced there was a clear abuse of discretion, and there is no such abuse if the evidence "tends" to sustain the cause of action as alleged. *State v. Southwestern Bell Tel. Co.,* 526 S.W.2d 526 (Tex.1975); *Oil Field Haulers Ass'n v. Railroad Comm'n,* 381 S.W.2d 183 (Tex.1964); *Janus Films, Inc. v. City of Fort Worth,* 163 Tex. 616, 358 S.W.2d 589 (1962); *Transport Co. of Texas v. Robertson Transports, Inc.,* 152 Tex. 551, 261 S.W.2d 549 (1953); *Texas Foundries, Inc. v. Foundry Workers,* 151 Tex. 239, 248 S.W.2d 460 (1952); *Southwestern Greyhound Lines v. Railroad Comm'n,* 128 Tex. 560, 99 S.W.2d 263 (Tex.1936); *Hickman v. Board of Regents,* 552 S.W.2d 616 (Tex.Civ.App.—Austin 1977, writ ref'd).[21]

It is also clear that a party is not to receive full relief at a hearing for a temporary injunction, since the burden at that stage—"probable right" and "probable injury"—is substantially different from that at a final hearing on the merits. *Houston Belt & Terminal Ry. Co. v. Texas & N.O.R.R. Co.,* 155 Tex. 407, 289 S.W.2d 217 (1956); *North East I.S.D. v. North East Federation of Teachers,* 541 S.W.2d 191 (Tex.Civ.App.—El Paso 1976, no writ).

Pursuant to Rules 680–693a of the Texas Rules of Civil Procedure, the state can obtain, ex parte, a 10-day temporary restraining order against the showing of

21. By way of comparison, this court has held that a federal district court, in order to grant a preliminary injunction, must find that the moving party has satisfied four prerequisites: (1) substantial likelihood of success on the merits; (2) a showing of irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. The movant has the heavy burden of persuading the district court that all four elements are satisfied, and this court will overturn the district court's decision only for abuse of discretion. *E. g., Hardin v. Houston Chronicle Pub. Co.,* 572 F.2d 1106 (5 Cir. 1978); *Canal Authority v. Callaway,* 489 F.2d 567 (5 Cir. 1974).

an allegedly obscene film. As soon as possible within the 10-day period, a hearing on a temporary injunction is obtainable. As the cases cited above make clear, this hearing is not a final adjudication on the merits, and, accordingly, the issuance of a temporary injunction is not a final judicial determination of obscenity. Rather, the granting of such an injunction represents the trial court's determination that the applicant has shown a "probable right" and a "probable injury" and has presented evidence that "tends" to sustain his cause of action. On appeal from the temporary injunction, the theater operator who has been enjoined cannot argue that the suppressed film is not obscene. Rather, "[t]he action under appellate review . . . is the exercise by the trial court of the discretionary power [to issue the injunction] pending trial, thereby maintaining the status quo." *State v. Southwestern Bell Tel. Co., supra* at 528.[22]

Under the Texas procedure, the obscenity case is treated no differently than any other civil case. Thus, if the theater operator is unable to convince an appellate court that the trial court abused its discretion in granting the temporary injunction, the order remains in effect and the film—which is presumably protected under the first amendment—remains suppressed pending a full-blown trial on the merits.[23] At such a trial, it is quite possible for the court to hold that the film is not obscene, *cf. Texas Foundries, Inc. v. Foundry Workers, supra* 261 S.W.2d at 464; *Lloyd A. Fry Roofing Co. v. State*, 541 S.W.2d 639, 648 (Tex.Civ.App.—Dallas 1976, writ ref. n. r. e.), with the end result being that a film protected by the first amendment has been indefinitely suppressed before an on-the-merits judicial determination of obscenity. The Court recognized such a danger in *Freedman*: "the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous" preliminary restraint. 380 U.S. at 59, 85 S.Ct. at 739. Moreover, in *Southeastern Promotions* the Court, as in *Freedman* analyzing an administrative system, stressed that a final on-the-merits judicial determination was not immediately available. Justice Blackmun wrote:

> The board's system did not provide a procedure for prompt judicial review. Although the District Court commendably held a hearing on petitioner's motion for a preliminary injunction within a few days of the board's decision, it did not review the merits of the decision at that time. The question at the hearing was whether petitioner should receive *preliminary* relief, i. e., whether there was a likelihood of success on the merits and whether petitioner would suffer irreparable injury pending full review. Effective review on the merits was not obtained until more than five months later. * * * During the time prior to judicial determination, the restraint altered the status quo.

420 U.S. at 561–62, 95 S.Ct. at 1248 [emphasis in original].

The identical situation is present under the Texas injunction procedure; the hearing on the temporary injunction does not constitute an on-the-merits determination of obscenity, and there is no provision for a prompt review on the merits. And, while such a temporary injunction is in effect, the status quo is obviously altered—rather than maintained—and presumably protected speech is indefinitely suppressed. It is difficult to improve upon the words of Judge Aldisert in *Grove Press, Inc. v. Philadelphia, supra*:

> The mischief we perceive . . . is that there is no guarantee a final hearing will be seasonably scheduled after the issuance of a preliminary injunction and that a prompt decision will be forthcoming thereafter. The preliminary restraint could exist days, and even months, before the judicial decision on the merits; where this possibility exists, an unacceptable threat to the freedom of expression without due process of law results.
>
> * * * * * *
>
> Where expression is inhibited as a result of prompt judicial decision reached after an adversary proceeding, there can be no procedural due process complaint. But where the inhibition occurs in a preliminary proceeding, with no guarantee of a prompt judicial decision on the merits, the procedure is constitutionally defective because a restraint of presumably protected expression not only occurs but is capable of persisting for an unlimited time prior to the required judicial determination.

418 F.2d at 90.

Accordingly, we hold that Article 4667(a)(3), which authorizes injunctions in the obscenity context, is constitutionally infirm for its failure to provide the safeguards mandated by *Freedman*. In short, the Texas procedure does not treat obscenity with the kid gloves that the first amendment requires, for the state's process for ascertaining whether certain materials are obscene must ensure "the necessary sensitivity to freedom of expression." *Freedman v. Maryland, supra* 380 U.S. at 58, 85 S.Ct. at 739. *Compare* the New York procedure outlined in *Kingsley Books, Inc. v. Brown, supra*, which the *Freedman* Court described as a "model."[24]

22. We note that the Texas procedure does not provide a mechanism for the issuance of a "preservation order" enjoining a theater from disposing of the allegedly obscene film pending trial but not interfering with its continued exhibition. *Compare* N.C.Gen.Stat. § 14–190.-2(d)(3); Tenn.Code Ann. § 39–3019. *See Paris Adult Theatre I v. Slaton, supra; Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

23. It is no answer to maintain that the theater operator could obtain a prompt, final judicial determination of obscenity by violating the injunction and thus bringing about contempt proceedings. *See* Tex.Rev.Civ.Stat.Ann. art. 1911a; Rule 692, Tex.R.Civ.P. Such a violation would constitute constructive criminal contempt, *Ex parte Werblud*, 536 S.W.2d 542 (Tex.1976), and the state would have the burden of proof beyond a reasonable doubt. Surely one is not required to risk criminal sanction in order to obtain what *Freedman* requires the state to provide. Under the contempt procedure, the burden of obtaining a prompt, final judicial determination of obscenity is impermissibly placed on the theater operator. Moreover, although the state has the burden of proving beyond a reasonable doubt that the theater operator is guilty of contempt, it is not clear whether the state also has the burden of proving that the film is obscene, as *Freedman* requires. *Cf. Railroad Comm'n v. Sample*, 405 S.W.2d 338, 343 (Tex.1966).

24. Texas once had a procedure by which obscenity injunctions were treated in a special fashion. Texas Penal Code of 1925, art. 527, § 13, *repealed*, Acts of 1973, 63d Legislature, ch. 399, § 3. This same legislation amended present Art. 4667 to include obscenity. Ch. 399, § 2(J). For judicial consideration of the former procedure, see *State v. Scott*, 460 S.W.2d 103 (Tex.1970), *cert. denied*, 402 U.S. 1012, 91 S.Ct. 2188, 29 L.Ed.2d 435 (1971); *Newman v. Conover*, 313 F.Supp. 623 (N.D. Tex.1970) (three-judge court); *Fontaine v. Dial*, 303 F.Supp. 436 (W.D.Tex.1969) (three-judge court).

The Pennsylvania injunction rules include the following provision:

[20, 21] Although this court can construe two state statutes to be exclusive of one another in order to avoid a constitutional difficulty, as we have done in Part I of this opinion, we cannot judicially rewrite the Texas statutes and rules to incorporate the *Freedman* safeguards. As the Supreme Court said in *Freedman* "[h]ow or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is for the state to decide." 380 U.S. at 60, 85 S.Ct. at 740. *Compare United States v. Thirty-Seven Photographs, supra* (federal statute). The task of complying with *Freedman* must therefore be left to the State of Texas.

IV.

[22] King Arts seeks a remand to the district court for a determination and award of costs and attorneys' fees. Under 42 U.S.C. § 1988, as amended in 1976, a "prevailing party" in an action brought under the Civil Rights Acts, 42 U.S.C. §§ 1981–86, may be awarded "a reasonable attorney's fee as part of the costs." The statute's constitutionality has been upheld. *Hutto v. Finney*, —— U.S. ——, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Rainey v. Jackson State College*, 551 F.2d 672 (5 Cir. 1977). These decisions also make clear that § 1988 permits attorneys' fees in cases that were pending at the time of its enactment. The instant case falls into that category.[25]

[23, 24] Although this court has discretion to award costs and fees arising out of an appeal to this court, *Globe Life & Accident Ins. Co. v. Still*, 402 F.2d 295 (5 Cir. 1968), we think that the district court should determine the total award here, *see Panior v. Iberville Parish School Board*, 543 F.2d 1117, 1120 (5 Cir. 1976), especially since the district court reached its decision on the merits prior to the effective date of the 1976 amendment to § 1988. Accordingly, we remand the case to the managing judge of the district court with directions to set reasonable attorneys' fees in accordance with the standards established in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5 Cir. 1974). The district court shall determine the necessity of holding an evidentiary hearing.

V.

The judgment of the district court holding unconstitutional Tex.Rev.Civ. Stat.Ann. art. 4667(a)(3) is AFFIRMED, and the case is REMANDED to the district court for the awarding of reasonable attorneys' fees to King Arts, the prevailing party.

SO ORDERED.

> When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decree shall be filed . . within twenty-four (24) hours after the close of the hearing. If the final hearing is not held within the three (3) day period, or if the final decree is not filed within twenty-four (24) hours after the close of the hearing, the injunction shall be deemed dissolved.
>
> Rule 1531(f)(1), Pa.R.Civ.P. An explanatory note states that the three-day period is a maximum and that "in particular cases, a shorter period may be required." For relevant judicial background, see *Grove Press, Inc. v. Philadelphia, supra; Duggan v. 807 Liberty Ave., Inc.*, 447 Pa. 281, 288 A.2d 750 (Pa.1972); *Commonwealth v. Guild Theatre, Inc.*, 432 Pa. 378, 248 A.2d 45 (Pa.1968).

25. As the panel opinion makes clear, attorneys' fees are permissible in a civil rights suit alleging violations of first amendment rights. 559 F.2d at 1300–01. *See also Simpson v. Weeks*, 570 F.2d 240 (8 Cir. 1978); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114 (1 Cir. 1977).

GEE, Circuit Judge, with whom BROWN, Chief Judge, COLEMAN, AINSWORTH, TJOFLAT and VANCE, Circuit Judges, join, dissenting:

I.

Of Draconian Remedies and Strained Constructions to Avoid Them

Part I of the majority opinion reaches the same result on about the same reasoning as the panel opinion, *see* 559 F.2d at 1290–92. I concur in it.

II.

Of Injunctions, Statutes and Prior Restraints

Part II of the majority opinion declares Texas Article 4667(a)(3) unconstitutional as authorizing injunctions against the future exhibition of unnamed obscene films. The Texas statutes defining obscenity are couched in the language of the Supreme Court's decision in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and there is no contention that their standards or definitions are overbroad. Further, the Texas courts (as a matter of general procedural law) require in the obscenity context as elsewhere that injunctions be specific, clear and definite. In the example chosen by the majority, *Richards v. State*, 497 S.W.2d 770 (Tex. Civ.App.—Beaumont 1973, no writ hist.), the injunction prohibited "exhibiting or selling any other films which show actual acts of fellatio . . ., cunnilingus . . ., actual oral genital contact between two or more males or females, any sexual intercourse, between any human and any animal or any scenes depicting actual sexual intercourse, between human males and females." 497 S.W.2d at 772. Modifying the decree to incorporate the holding of *Miller v. California, supra*,[1] the Texas court upheld the injunction.

Thus the holding of the majority appears to be that any injunction, no matter how specific, that restrains the exhibition of films by definitions or categories rather than one-by-one and after the fact of a specific, prior adjudication of obscenity is invalid. To quote from the opinion (Maj. op. p. 1653):

> "An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. As Chief Justice Hughes wrote in *Near v. Minnesota, supra*, 283 U.S. 697, at 713, 51 S.Ct. 625, '[t]his is of the essence of censorship.' "

I think that there are serious flaws in this reasoning.

In the first place, the majority's statement is simply incorrect: an injunction against exhibiting a film depicting enumerated acts from the obscenity statute suppresses that film not at all "because past films have been deemed offensive" but because the present film depicts the acts in a manner forbidden by the statute.

In the second, the quotation from *Near v. Minnesota* is a characterization of an entirely different sort of act—the suppression of publication of future issues of a newspaper because earlier issues were deemed scandalous. The analog of such an act in the present context

1. "The injunction granted by this paragraph of the order is limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value." 497 S.W.2d at 782.

would be the closing of King Art's Theatre to exhibition of *any* film because it had exhibited obscene ones in the past. This would indeed be "of the essence of censorship," but it is a far cry from an injunction forbidding in specific terms the exhibition of such films only as violate the statute.

Indeed, the majority's reasoning on this head comes to little more than announcing that injunctions are prior restraints and prior restraints are bad. The suggestion that an injunction merely against obscene matter—admittedly unprotected by the first amendment—might be valid is disposed of, as nearly as I can understand the opinion, by the observation that obscenity cannot be defined with sufficient precision to be the subject matter of a valid injunction. Unless this is what the sentence at Maj. op. p. 1653 commencing "Incorporation of the statutory definition of obscenity . . . merely begs the question" means, then I do not know what it means. But this argument proves too much, for if the definition is too vague for an injunction, surely it must also be too vague to satisfy due process as giving fair notice of conduct subject to criminal penalties?

More, the argument is overbroad in another respect. It implies that no injunction in a first amendment context is valid, though we know this is not so. Indeed, as a practical matter, I can see little if any difference between an injunction against exhibiting obscene films (constitutionally defined) and a statute against doing so, and what difference there is favors the injunction. As Mr. Justice Frankfurter wrote for the Court in *Kingsley Books v. Brown*, 354 U.S. 436, 441–2, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957):

"The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly noxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539.

"Wherein does § 22-a differ in its effective operation from the type of statute upheld in Alberts? Section 311 of California's Penal Code provides that 'Every person who wilfully and lewdly . . . keeps for sale . . . any obscene . . . book . . . is guilty of a misdemeanor . . . .' Section 1141 of New York's Penal Law is similar. One would be bold to assert that the *in terrorem* effect of such statutes less restrains booksellers in the period before the law strikes than does § 22–a. Instead of requiring the bookseller to dread that the offer for sale of a book, may without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell it on his own judgment rather than steer 'nervously among the treacherous shoals.' "

Thus if a statute forbidding publication of obscenity can be constitutionally valid, it is hard for me to see how an injunction doing the same thing is per se invalid. Yet as nearly as I can understand the majority opinion, this is what Part II of it says.

III.

Of Kid Gloves and Obscenity

Part III of the court's opinion purports to invalidate Texas Article 4667(a)(3) on the additional ground that it "lacks the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)" (Maj. op. p. 1653) and hence fails to "treat obscenity with the kid gloves that the first amendment requires, . . ." (Maj. op. p. 1656). But since Article 4667(a)(3) does no more than in general terms authorize an injunction, thus implicitly referring to the basic Texas injunction procedures, it is in fact these latter which the opinion finds procedurally deficient when sought to be employed against obscenity. These procedures are patterned on the Federal ones, Texas Rules of Civil Procedure 680 and 681 which define them being copied from Federal Rule 65, with minor and insignificant textual changes. It is plain, therefore, that a necessary consequence of the majority opinion is to invalidate our Rule 65 procedures to the same extent as the Texas ones, an effect which practitioners in our courts should note. Thus we impliedly hold today that those who crafted and promulgated our own Federal system of injunctions overlooked providing a procedure valid for use in the obscenity context, a somewhat far-reaching and arresting conclusion.

The majority reaches this result by fixing on one word of the Supreme Court's language in two cases arising in a somewhat different context from this, court review of *administrative* censorship. With deference, it seems to me that the contexts are sufficiently dissimilar that the language in question need not and should not be applied here, where no administrator and no censor—only courts—figure in the matter anywhere. The two cases are *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); the word seized upon is the term "final."

In a nutshell, the majority holds that Texas (and hence Federal) injunction procedures are invalid as applied to obscenity because they do not require a "final" ruling on the merits of obscenity before preliminary injunctions may issue against the pornographer, only the ascertainment of that "probable right" thought a sufficient basis for the interlocutory writ in all other contexts. This holding is said to be required by an expression of the Supreme Court in *Freedman*, refined and restated in *Southeastern*, running as follows:

> We held in *Freedman*, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt *final* judicial determination must be assured. 420 U.S., at 560, 95 S.Ct. at 1247 (emphasis added).

The context of *Freedman* and *Southeastern*, however, was very different from

this. Here all action, from start to finish, was judicial; no administrator or censor figured in the matter at any stage;[2] and the only conceivable "prior restraint" would have been a preliminary injunction pendente lite. In *Freedman*, by contrast, there was involved a procedure for the absolute administrative suppression of a film by refusal of a censor's license; and in *Southeastern*, the use of a theatre was administratively refused, thus preventing entirely the production of a musical there. These were "final" administrative acts; final, that is, unless and until those complaining of them took their cases to court and bore the burden of overturning them. In such situations, the quoted formulation by the Supreme Court makes sense and has full application: limiting the censor to a brief, administrative restraint, followed by judicial review at the instance of the censor, with the burden of proof upon him, and a required prompt, final judicial determination ending the administrative ministry one way or the other.

Nor has the Court left us in doubt about why it requires prompt and final judicial action in such a context: it is because "[d]uring the time prior to judicial determination, the [administrative] restraint altered the status quo"[3] and after administrative intervention "a judicial determination must occur 'promptly so that administrative delay does not in itself become a form of censorship.'"[4] In other words, only a brief *non*-judicial interdiction of matter arguably protected by the first amendment will be tolerated; and if material has been taken off the market by a final administrative action pending a judicial decision, that decision must come quickly. Here, however, neither reason for such a rule obtains. There neither was nor could have been any administrative restraint to alter the status quo. Nor could such a restraint (since there neither was nor could have been one) have required hurried judicial action finally upholding or reversing it, lest administrative delay become itself an instrument of suppression.

That these holdings have application to proceedings such as this, which contemplate neither censor nor other administrator but only the normal judicial process, is far from clear to me. To apply, their rule must be rewritten to run as follows: where a preliminary judicial decision resulting from an adversary hearing has been made that matter is probably obscene and should be taken off the market pendente lite, a procedural scheme—to be valid as applied to pornography—must further require that the judge conduct a prompt hearing on the merits of obscenity and render a prompt final judgment on it as well.

I do not deny that there are arguments that can be made in support of such a rule. It seems to me, however, that they are of quite a different sort than those which underlie the rule of *Freedman* and *Southeastern:* that censors (all too often, history teaches, afflicted by tunnel vision) should not be permitted to remove first-amendment

2. Indeed, the only action ever contemplated was a *suit* by the county attorney to obtain an injunction against the showing of obscene motion pictures. King Arts forestalled even this by bringing its own suit in federal court to restrain the county attorney from such an action.

3. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 95 S.Ct. 1239, 1248, 43 L.Ed.2d 448 (1975).

4. *Heller v. New York*, 413 U.S. 483, 489, 93 S.Ct. 2789, 2793, 37 L.Ed.2d 745 (1973), quoting from *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367, 91 S.Ct. 1400, 28 L.Ed.2d 44 (1971).

type matter from the marketplace indefinitely or cast the burdens of going forward or of proof on its purveyors; and that where such matter is censored, prompt and effective review by a judge must be provided so that the matter is, if protected, returned to the marketplace without any lengthy languishing under administrative ban. I hope that I am not insensitive to first amendment considerations and issues; but it seems to me that where mere successive stages of judicial consideration—usually before the same judge—are concerned rather than review by the judge of a censor's fiat, the general procedures which suffice for all other purposes should be sufficient for dealing with pornography.

Conclusion

For the above reasons, I respectfully dissent from Parts II and III of the opinion herein.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

NO. 216,943

THE STATE OF TEXAS, Plaintiff	X X X	IN THE DISTRICT COURT OF
V.	X X	TRAVIS COUNTY, TEXAS
ROY L. STAMBAUGH, d/b/a AUSTIN BOOK MART, Defendant	X X X	126TH JUDICIAL DISTRICT

PERMANENT INJUNCTION

On the 18th day of April, 1974, came on to be considered Plaintiff's application for a Permanent Injunction against Defendant, Roy L. Stambaugh, d/b/a Austin Book Mart, wherein Plaintiff seeks to enjoin Defendant from operating the said Austin Book Mart so as to constitute a public nuisance under Article 4667, Vernon's Texas Civil Statutes, by the habitual use of the premises of the Austin Book Mart for the commercial distribution and commercial exhibition of obscene material as such terms are defined in Chapter 43, Subchapter B, Texas Penal Code; and the State of Texas appearing by her District Attorney and the Attorney General of Texas, and Defendant after due notice appearing (in person) and by his attorneys of record, Hugh Lowe and J. Mack Ausburn; and the Court having heard the evidence and argument of counsel, and it appearing to the Court upon good and sufficient evidence that Plaintiff is entitled to the Permanent Injunction as herein granted, for the reasons that the Defendant has habitually used the premises occupied by the Austin Book Mart for the commercial distribution and commercial exhibition of obscene materials; specifically, the Court finds that

(1) On April 2, 1973, on said premises, the Defendant commercially distributed an obscene motion picture film entitled "The Gunman and his Young Victim". (State's Exhibit No. 19);

(2) On April 9, 1973, the Defendant commercially distributed an obscene motion picture film entitled "The Housewife and the Woodchopper." (State's Exhibit No. 20);

(3) On June 27, 1973, the Defendant commercially distributed an obscene motion picture film entitled "Box Boy". (State's Exhibit No. 21);

(4) On July 27, 1973, the Defendant commercially distributed an obscene magazine entitled "Spring and Fall". (State's Exhibit No. 22);

(5) On November 20, 1973, the Defendant commercially distributed an untitled obscene motion picture film in a box marked "Linda and Gene". (State's Exhibit No. 26);

(6) On December 12, 1973, the Defendant commercially distributed an obscene magazine entitled "The Longhorns". (State's Exhibit No. 24);

(7) On December 13, 1973, the Defendant commercially distributed an obscene magazine entitled "Lovebug". (State's Exhibit No. 25);

(8) On February 4, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "World of Love and Sex". (State's Exhibit No. 28);

(9) On February 4, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "U.S. Sex". (State's Exhibit No. 29);

(10) On February 6, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Adult Garden of Sex". (State's Exhibit No. 33);

(11) On February 8, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "The Sexual Woman". (State's Exhibit No. 12);

(12) On February 25, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Case Histories - A Study of Sadomasochism". (State's Exhibit No. 14);

(13) On February 28, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Wild Couples". (State's Exhibit No. 27);

(14) On March 1, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Boy Friends". (State's Exhibit No. 16);

(15) On March 13, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Boy Play". (State's Exhibit No. 5);

(16) On March 15, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Cinema Sex". (State's Exhibit No. 31);

(17) On March 21, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Trojan". (State's Exhibit No. 32);

(18) On April 5, 1974, the Defendant possessed with intent to commercially distribute an obscene magazine entitled "Adult Garden of Sex". (State's Exhibit No. 6).

The Court finds that each of the aforesaid motion pictures and magazines are obscene as that term is defined in Section 43.21 of the Texas Penal Code as interpreted by the Court of Criminal Appeals of Texas and as further defined and refined by the Supreme Court of the United States in Miller v. California, ____ U.S. ____ (1973); and the Court further finds that because of the past and continuous operation of the premises of the Austin Book Mart for the commercial distribution and commercial exhibition of obscene materials, that such practice is likely to continue and that Plaintiff should have and is entitled to a Permanent Injunction enjoining the future commercial exhibition and commercial distribution of obscene material; it is accordingly

ORDERED, ADJUDGED and DECREED that the Clerk of the Court issue a Writ of Injunction permanently enjoining the Defendant from operating the premises of the Austin Book Mart so as to constitute a public nuisance through the habitual use of such premises for the commercial distribution and commercial exhibition of obscene material; Defendant is enjoined from commercially exhibiting and distributing the motion pictures and magazines described above; and that the Defendant be permanently enjoined from commercially distributing and commercially exhibiting any other magazine, films, or other materials which pictorially portray deviate sexual intercourse as that term is defined in Section 21.01(1) of the Texas Penal Code, to-wit: Deviate sexual intercourse being any contact between any part of the genitals of one person in the mouth or anus of another; and any magazine, film or other materials which pictorially portray sexual intercourse as that term is defined in Section 21.01(3), to-wit: Sexual intercourse is any penetration of the female sex organ by the male sex organ; and any magazine, film or other materials which pictorially portray the old offense of bestiality as now defined in Section 21.07(a)(4) of the Texas Penal Code, to-wit: An act involving contact between a person's mouth or genitals and the anus or genitals of any animal or fowl; and Defendant is further permanently enjoined from distributing and exhibiting commercially any other motion pictures, magazines or other materials which contain representation or descriptions of ultimate sex acts, normal or perverted, actual or simulated, or which contain representations or descriptions of masturbation, excretory functions and the lewd exhibition of the genitals; all of the aforesaid materials, including those introduced, those that portray deviate sexual intercourse, sexual intercourse, and bestiality, and materials of the type immediately described above, must further be those which have a dominant theme, taken as a whole, which appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken

as a whole, do not have serious literary, artistic, political or scientific value and are utterly without redeeming social value;

The Court, in issuing the injunction described above, is relying only on motion pictures and magazines that were introduced into evidence before this Court and which were either purchased or which were seized pursuant to a search warrant wherein the materials were described by name and by the content and no consideration was given by the Court in reaching its determination herein to any materials that were seized pursuant to the search warrant but were not named and described in the affidavit upon which such warrants rest;

In view of the serious constitutional questions that always arise when prior restraints are imposed upon the distribution of materials that may possibly be protected by the free speech provision of the First Amendment to the United States Constitution and because the imposition of prior restraints must be speedily resolved at an adversary hearing, this Court will not entertain in the future INTERCASE OR AGAINST THIS DEFENDANT any applications for Temporary Restraining Orders without notice to and the opportunity to be heard by the persons sought to be enjoined should the State again seek to proceed under Article 4667, Vernon's Texas Civil Statutes; should any further applications seeking an injunction against the commercial distribution or exhibition of obscene materials be sought, no restraining order or injunction will be issued by this Court until a hearing is held either on the application for a Temporary Injunction, if such a request is made, or until the hearing on the Permanent Injunction if the State does not seek a Temporary Injunction.

Signed and entered this 7 day of MAY, 1974.

JUDGE PRESIDING

Supreme Court, U. S.
FILED
SEP 6 1979
MICHAEL RODAK, JR., CLERK

APPENDIX
VOLUME I

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
NO. 78-1588

* * *

CAROL VANCE, ET AL.,
Appellants

V.

UNIVERSAL AMUSEMENT COMPANY, INC., ET AL.,
Appellees

* * *

Appeal From The United States Court of Appeals For The Fifth Circuit

* * *

NOTICE OF APPEAL FILED JANUARY 15, 1979

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 78-1588

* * *

CAROL VANCE, ET AL.,

Appellants

VS.

UNIVERSAL AMUSEMENT COMPANY, INC., ET AL.,

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* * *

Appeal From The United States Court of Appeals For The Fifth Circuit

* * *

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NOTATION

The following items appear in appendicies to the Jurisdictional Statement at the pages noted and are not reproduced in this Appendix:

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED September 28, 1977 ..... Appendix I

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, REHEARING EN BANC FILED DECEMBER 18, 1978 ..... Appendix II

ORDER IN THE CASE OF STATE V. STAMBAUGH ..... Appendix III

DATE	PROCEEDINGS	Date of Judgment
11/12/73	Plaintiff's ORIGINAL COMPLAINT, filed. (w/request for 3 judge crt) (WS) This case is transferred to the docket of Judge Singleton's docket.	
4/26/73	Issued summons on all defts.	
5/1/73	Return of Summons on the following, served 5-1-73, filed: Troy R. Driskell Captain James M. Albright Herman Short Judge I.D. McMaster	
5/2/73	(JVS) HEARING ON APPLICATION FOR TRO: Appearances: Clyde Woody and Marion Rosen for plaintiffs. Joe Rollins and Joe Moss for defendants. Testimony of witnesses and argument of counsel. Court's ruling: Temporary restraining order DENIED.	
5/7/73	Return of Summons on Carol Vance, served 5-2-73, filed.	
9/73	( ) ORDER, filed, setting up three judge court consisting of John V. Singleton, Jr., Carl Bue and Joe Ingraham.	
5/21/73	DEFENDANT'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS, PURSUANT TO RULE 12, FRCP, OR, IN THE FURTHER ALTERNATIVE, DEFEN-	

DANTS' ANSWER, filed. MD: 6-4-78 W/JURY DEMAND

5/22/73 RESPONSE OF THE STATE OF TEXAS, filed.

5/23/73 MOTION OF DEFENDANTS CAROL VANCE AND I.D. McMASTER TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS, PURSUANT TO RULE 12, FRCP, OR IN THE FURTHER ALTERNATIVE, DEFENDANTS' ANSWER, filed. M/D 6-18-73

5/25/73 (JVS) All preliminary motions deemed necessary, together supporting briefs will be filed on or before July 13, 1973. Such motions will include motions to dismiss, motions for judgment based upon any alleged unconstitutional aspects of the statutes involved and the procedures followed by the law enforcement agencies, including the seizure of the film, and any and all other motions counsel deem necessary. An oral hearing on all these motions will be held on Monday, July 30, 1973 at 9:30 A.M. This hearing will not include any matters relating to a factual determination of the alleged obscenity of the film but will be limited to the motions filed and any other procedural matters. If a further hearing to develop the facts on alleged obscenity is necessary a

date will be set at that time for such a hearing. Parties ntfd. by letter from the court.

6/26/73 ORDER Superseding part order of May 8, 1973 constituting a 3-Judge Court in this case, consisting of Judge Joe Ingraham, U.S. Circuit Judge; Judge John V. Singleton, Jr., U.S. District Judge for the Southern District of Texas; Judge W.M. Taylor, Jr., U.S. District Judge for the Northern District of Texas, signed on the 25th day of June, 1973, filed and entered. Parties ntfd. dw.

7/16/73 Pltf. MOTION FOR JUDGMENT, filed.

7/16/73 MEMORANDUM BRIEF of Deft. Short, Albright & Driskell, filed.

7/23/73 Floyd Travis Martin MOTION TO APPEAR AMICUS CURIAE, filed.

7/23/73 Pltf. Jones BRIEF, filed.

7/24/73 Deft. Dyson (City of Dallas) MEMORANDUM BRIEF, filed.

7/30/73 (JVS)(JI)(WMT) ORAL ARGUMENTS ON MOTIONS TO DISMISS: Argument of counsel. Motion of Floyd Martin to appear as friend of the court overruled. Case taken under advisement by the court. Brief to be filed within 10 days.

8/7/73 Floyd Travis Martin MOTION TO INTERVENE AS DEFENDANT, filed. M/D 9/10/73 by clerk.

8/9/73 Pltf. (73-H-1114(MOTION TO CONSOLIDATE, filed.

8/10/73 Pltf. (Universal Amusement) SUPPLEMENTAL BRIEF, filed.

8/16/73 Deft. (Dyson, et al) SUPPLEMENTAL BRIEF In Support of Their Motion to Dismiss, filed. (Copy).

8/21/73 TRANSCRIPT OF PROCEEDINGS of July 30, 1973, filed.

9/5/73 REPORTER'S TRANSCRIPT of Proceedings on May 2, 1973, filed.

9/7/73 (JRB) ORDER, filed, consolidating 3-7398, Associated Theaters v. Dyson, 3-7437-C, Associated Theaters v. Wade, (both in N/D of Texas); C.A. 73-H-1114, Hargrove, et al v. Hill, et al; and SA-72-CA-214, Southland Theaters v. Butler, et al (W/D of Texas) with this case for submission and hearing.

12/12/73 Pltfs' MOTION FOR RECONSIDERATION OF TEMPORATY RESTRAINING ORDER AND EQUITABLE RELIEF, filed. Parties ntfd. jb

12/17/73 BRIEF of the San Antonio Civil

Liberties Union -- Amicus Curiae, filed. (In connection with Ca-SA-73-CA-124)

12/17/73 (JVS) HEARING ON MOTION FOR RECONSIDERATION OF TEMPORARY RESTRAINING ORDER AND EQUITABLE RELIEF: Argument of counsel. Motion for TRO denied. Parties told to use state remedies.

1/8/74 TRANSCRIPT OF PROCEEDINGS, filed.

1/17/74 Pltf. Burke A. Hargrove's MOTION TO SUBSTITUTE EVIDENCE, filed.

1/17/74 (JVS) ORDER TO SUBSTITUTE EVIDENCE filed. Clerk of this Court to prepare duplicate copies of all original records heretofore submitted by the District Clerk of Brazos County, Texas, and that the originals be returned to said County, with costs of duplication to be charged to Plaintiffs. Parties ntfd. jab

4/22/74 In Cause No. A-74-Ca-078, Deft Bob Miles's NOTICE OF DEPOSITION of Roy Stambaugh and REQUEST FOR PRODUCTION OF DOCUMENTS, filed.

4/23/74 In Cause No. A-74-CA-078, Deft Bob Miles' ANSWER, filed.

4/26/74 In Cause No. A-74-CA-078, Deft Bob Miles' REQUEST FOR AD-

MISSIONS FROM PLAINTIFF SAN ANTONIO BOOK MART, INC., filed.

4/29/74 RESPONSE OF DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AND JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, filed.

4/29/74 (JVS) TEMPORARY RESTRAINING ORDER, filed and entered, regarding CA-A-74-CA-078, parties ntfd. rm

5/1/74 Deft Robert O. Smith's ANSWER, filed.

5/7/74 In CA-A-74-CA-078, Pltf's MOTION TO EXTEND TEMPORARY RESTRAINING ORDER, filed.

5/9/74 (JVS) ORDER EXTENDING TEMPORARY RESTRAINING ORDER, filed and entered regarding CA-A-74-CA-078, parties ntfd. rm

5/10/74 In CA-A-74-CA-078, Deft Bob Miles' NOTICE OF DEPOSITION of Pltf AND REQUEST FOR THE PRODUCTION OF DOCUMENTS, filed.

5/20/74 In CA-A-74-CA-078, Pltf San Antonio Book Mart, Inc.'s SECOND MOTION TO EXTEND TEMPORARY RESTRAINING ORDER, filed.

5/21/74 (JVS) SECOND ORDER EXTENDING TEMPORARY RESTRAINING ORDER, filed and entered, regarding CA-A-74-CA-078, extending temporary restraining order issued April 29, 1974 until a hearing on Pltf's motion for preliminary injunction or until May 29, 1974. Parties ntfd. jb

5/22/74 In CA-SA-73-CA-214, Pltfs Southland Theatres, Inc., Southland Theatres, Inc.-Main and King Arts Theatre, Inc.'s MOTION FOR SETTING ON PRELIMINARY AND PERMANENT INJUNCTION, filed. M/D 6/17/74 by Clerk

5/22/74 In CA-A-74-CA-078, Pltf's MOTION TO VACATE NOTICE OF DEPOSITION AND MOTION FOR PROTECTIVE ORDER, filed.

5/22/74 InCA-A-74-CA-078, Pltf's RESPONSE TO DEFENDANT MILES' REQUEST FOR THE PRODUCTION OF DUCMENTS filed.

5/22/74 (WS) ORDER, filed and entered, in CA-A-74-CA-078, entering a protective, order, staying the taing of the deposition noticed by Deft Bob Miles for May 23, 1974, at 8:00 a.m., until a determination of the merits of this motion by further orders of the court. Parties ntfd. jb

5/31/ In CA-A-74-CA-078, Pltf San Antonio Book Mart, Inc.'s THIRD MOTION TO EXTEND TEMPORARY RESTRAINING ORDER, filed.

5/31/74 (JVS) ORDER, filed and entered, ordering a preliminary injunction pursuant to Rule 65(a), Fed. R. Civ. P., issue and that this preliminary injunction shall remain in effect until the three-judge court can be convened. Parties ntfd. jb

6/10/74 In B-74-142-CA, Deft Dexter Patterson's ORIGINAL ANSWER, filed.

6/10/74 In B-74-142-CA, Deft. Tom Hanna's ORIGINAL ANSWER, filed.

6/13/74 In B-74-142-CA, RESPONSE OF THE STATE OF TEXAS, filed.

6/13/74 In B-74-142-CA, Return of Summons on Harold Clayton, executed 6/11/74, filed.

6/13/74 In B-74-142-CA, Return of Summons on Tom Hanna, executed 6/11/74, filed.

6/13/74 In B-74-142-CA, Return of Summons on Dexter Patterson, executed 6/11/74, filed.

6/24/74 In A-74-CA-078, Pltf's RESPONSES TO DEFENDANT MILES' REQUESTS FOR ADMISSIONS, filed.

7/24/74 (JRB) ORDER, filed and entered, consolidating SA-74-CA-168 with CA-73-H-528.

7/29/74 (JVS) TEMPORARY RESTRAINING ORDER, filed and entered, regarding SA-74-CA-168 parties ntfd. jb

7/29/74 (JVS) BOND, filed and entered in SA-74-CA-168, parties ntfd. jb

8/2/74 IN SA-74-CA-168, return of service on writ to serve copy of temporary restraining order on E. E. Peters, received in Western District of Texas, July 30, 1974, filed.

8/2/74 IN SA-74-CA-168, return of service on writ to serve copy of temporary restraining order on Ted Butler, received in Western District of Texas, July 30, 1974, filed.

8/5/74 In SA-74-CA-168, ORIGINAL ANSWER of Deft Emil E. Peters, Chief of Police, filed.

8/6/74 In SA-74-CA-168, Return of Summons on Ted Butler, executed 7/16/74, filed.

8/6/74 In SA-74-CA-168, Return of Summons on E. E. Peters, executed 7/16/74, filed.

8/6/74 In SA-74-CA-168, Return of Summons on John Hill, executed 7/16/74, filed.

8/6/74 In SA-74-CA-168, Return of Summons on Dolph Briscoe, executed 7/16/74, filed.

8/6/74 In SA-74-CA-168, Deft Ted Butler's MOTION FOR DISSOLUTION OF TEMPORARY RESTRAINING ORDER, filed. M/D 8/26/74 by Clerk

8/6/74 In SA-74-CA-168, Deft Ted Butler's ORIGINAL ANSWER, filed.

8/6/74 In SA-74-CA-168, ADVERSARY HEARING before Justice of Peace Fred Clark, filed.

8/6/74 In SA-74-CA-168, ADVERSARY HEARING before Justice of Peace J. P. Gutierrez, filed.

8/7/74 In SA-74-CA-168, RESPONSE OF NOMINAL DEFENDANTS DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS AND JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, filed.

8/7/74 (JRB) ORDER, filed and entered, consolidating SA-74-CA-176 with CA 73-H-528.

8/8/74 Return of Service on TRO on Ted Butler, executed 7/30/74, filed.

8/8/74 Return of Service on TRO on E. E. Peters, executed 7/30/74, filed.

8/9/74 Pltf Richard C. Dexter's MOTION TO EXTEND TEMPORARY RESTRAINING ORDER, in SA-74-CA-168, filed.

8/9/74 (JVS) ORDER EXTENDING TEMPORARY RESTRAINING

ORDER, filed and entered, extending restraining order issued July 29, 1974 for ten days from this date, unless extended by this court in SA-74-CA-168. Parties ntfd. jb

8/15/74 Pltfs' MOTION FOR DISMISSAL, filed.

8/20/74 (JVS) ORDER, filed. Pretrial conference held. In SA 74-CA-168, CA 6-346 and CA3-74-130 it is ordered that on or before September 6, 1974 at 5:00 the parties in each case will file an agreed pretrial order. On or before october 4, 1974 at 5:00 P.M. the parties in each case will file briefs concerning the legal issues presented in each case. In the rest of the consolidated cases a temporary injunction has been or will be entered pending the final disposition of these cases by a three-judge court. Parties ntfd. rm.

8/20/74 (JVS) ORDER, filed, severing and dismissing all plaintiffs and defendants in the cause numbered C. A. 73-H-528. However, as to the remaining plaintiffs and defendants in this consolidated cause of action said cause of action shall continue. Parties ntfd. rm.

8/21/74 Received Defts' NOTICE TO TAKE ORAL DEPOSITION of Pltf, filed August 14, 1974 in Northern District of Texas in CA-3-74--130-E.

8/21/74 Received Deft Tim Curry's MOTION TO COMPEL ANSWER TO INTERROGATORIES TO PLAINTIFF, filed August 19, 1974 in Northern District of Texas in CA-4-74-28.

8/21/74 Received Deft R. E. Ashmore's MOTION TO COMPEL ANSWER TO INTERROGATORIES TO PLAINTIFF, filed August 19, 1974 in Northern District of Texas in CA-4-74-45.

8/22/74 In SA-74-CA-176, Defts John L. Hill and Dolph Briscoe's ORIGINAL ANSWER, filed.

8/23/74 (JVS) ORDER EXTENDING TEMPORARY RESTRAINING ORDER, filed and entered, extending restraining order issued July 29, 1974 for ten days from this date, unless extended by this court in SA-74-CA-168. Parties ntfd. jb

9/3/74 (JVS) MOTION FOR TEMPORARY INJUNCTION AND ORDER in CA-4-74-28, filed. Motion to be heard at 9:30 a.m., September 6, 1974. Parties ntfd. jb

9/5/74 In CA-3-74-130-E, STIPULATIONS OF FACT, filed.

9/5/74 In CA-3-74-130-E, STIPULATIONS OF FACT, filed.

9/6/74 (JVS) TEMPORARY RESTRAINING ORDER, filed and entered, ordering that all state

proceedings anc activities with regard to Pltfs in the consolidated cases be enjoined and stayed until the three-judge panel can meet and decide
no pending state criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases. This order shall not apply to Ellwest v. Walls, CA-4-74-45. Cinema X v. Curry & Walls, CA-4-74-28, Southland Theatres v. Butler, SA 74-CA-214 and Sun Family Entertainment v. Hanna, B-74-142 CA. Parties ntfd jb

9/6/74 Received DEPOSITION of Roy L. Stambaugh in A-74-CA-078, filed June 6, 1974, in Western District of Texas.

9/9/74 Received AMENDMENT BY STIPULATION in CA-3-74-130-E, Ellwest Stereo Theatres, Inc. vs. Donald Byrd, filed September 4, 1974, in Northern District of Texas.

9/12/74 (JRB) ORDER, filed and entered, consolidating A-74-CA-189, J. Norman Wells vs. Bob Miles with CA-73-H-528.

9/13/74 In CA-3-7347, BRIEF OF DEFENDANTS DISTRICT JUDGE WALKER, DISTRICT ATTORNEY WADE, AND ASSISTANT DISTRICT ATTORNEYS WEATHERLY, ETHINGTON, AND HAGLER, filed.

9/13/74 In CA-4-74-28 Deft T. S. Walls' ANSWER IN OPPOSITION TO INSTRUMENT DESIGNATED "MOTION FOR TEMPORARY INJUNCTION" filed by Plaintiff, Cinema X Inc., filed.

9/17/74 DEFT. TIM CURRY'S RESPONSE TO PLAINTIFF'S "MOTION FOR TEMPORARY INJUNCTION", filed. (CA-4-74-28)

9/17/74 MOTION FOR HEARING AND DETERMINATION BY THREE -JUDGE COURT (Tim Curry), filed. (CA-4-74-28)

9/17/74 (JVS) HEARING MOTION FOR TEMPORARY INJUNCTION: Appearances: Tom Higgins for plaintiffs' Joe Shannon, Jr. and S. Gl. Johndroe, Jr. for defendants. Argument of counsel and offering of exhibits. Court abstains from ruling on seizure of film pending ruling of the 3-Judge court.

9/18/74 Received entire file of A-74-CA-189, J. Norman Wells vs. Bob Miles, etc.

9/25/74 Received in CA-3-74-130-E, Defts' MOTION TO COMPEL DISCOVERY filed August 22, 1974 in Northern District of Texas.

9/27/74 (JRB) ORDER, filed and entered, consolidating CA-7-74-65 Carson, et al vs. Bailey, et al, CA-7-74-43,

Claybrook vs. Bailey, et al and CA-7-74-45 Lovely, et al, vs. Driver, et al with CA 73-H-528.

9/30/74 Received in A-74-CA-189,ANSWER OF DEFENDANT, BOB MILES filed September 24, 1974 in Western District of Texas

10/3/74 In CA-6-345 (Lubbock), Pltf's BRIEF NUISANCE - COMING IN THE BACK DOOR AGAINST FIRST AMENDMENT RIGHTS filed.

10/4/74 Received entire files in CA-7-74-65, CA-7-74-43 and CA-7-74-45.

10/7/74 Received in CA 7-74-43, Pltf's MOTION TO WITHDRAW AS ATTORNEY OF RECORD, filed September 30, 1974 in Northern District of Texas.

10/7/74 (JVS) ORDER, filed and entered, granting Pltf's Motion to Withdraw as attorney of record; thus removing the name of Tim M. Finnical. Parties ntfd. jb

10/7/74 Received in CA 7-74-43, Pltf's MOTION TO BE LISTED AS ATTORNEY OF RECORD, filed September 30, 1974 in Northern District of Texas.

10/7/74 (JVS ORDER, filed and entered, granting Motion to be listed as Attorney for in Pltf. Parties ntfd. jb

10/7/74 Received in CA 7-74-43, Pltf's MOTION TO BE LISTED AS ATTORNEY OF RECORD, filed September 30, 1974 in Northern District of Texas.

10/7/74 (JVS) ORDER, filed and entered, granting Motion to be listed as atty of record; thus entering the name of Bennie Juarez. Parties ntfd. jb

10/7/74 Received in CA 7-74-65, Defts H. Dale Bailey and H. Deloyd Bailey's MOTION TO DISMISS, filed October 2, in Northern District of Texas.

10/7/74 Received in CA-3-74-130-E, Defts Byrd and Southall's BRIEF, filed October 4, 1974 in the Northern District of Texas.

10/4/74 In SA-CA-176, Defts City of San Antonio Police Department, Chief Emil E. Peters & Captain James Despre's BRIEF, filed.

10/7/74 IN CA-3-74-130-E, Pltf's BRIEF IN SUPPORT OF PETITION FOR DECLARATORY RELIEF, filed.

10/8/74 TRANSCRIPT OF PROCEEDINGS, filed.

10/8/74 In A 74-CA-189, Wells vs. Miles, Pltf's MOTION FOR TEMPORARY RESTRAINING ORDER, filed.

10/16/74 In SA-74-CA-168, Pltf's Attorney J. Mack Ausburn's MOTION TO WITHDRAW AND FOR SUBSTITUTION OF COUNSEL, filed.

10/16/74 (JVS) ORDER, filed and entered, granting Pltf's Motion to Withdraw and for Substitution of Counsel. J. Mack Ausburn to withdraw with the appearance of Gerald H. Goldstein, Esq., 29th Floor, Tower Life Bldg., San Antonio, Texas and Frierson M. Graves, Esq., 2020 First National Bank Bldg., Memphis, Tennessee. Parties ntfd. jb

10/16/74 In SA-74-CA-168, Deft's Second MOTION FOR DISSOLUTION OF TEMPORARY RESTRAINING ORDERS AND FOR A CONVENTION OF THREE JUDGE COURT AND MOTION TO DISMISS, filed.

10/16/74 In SA 74-CA-168, Deft's BRIEF IN SUPPORT OF SECOND MOTION FOR DISSOLUTION OF TEMPORARY RESTRAINING ORDERS AND FOR CONVENTION OF THREE JUDGE COURT AND MOTION TO DISMISS, filed.

10/30/74 (JVS) ORDER, filed (SA 74-CA-168). Parties ordered to file stipulations by November 4, 1974. Parties ntfd. rm.

11/1/74 (JVS) HEARING ON MOTION FOR REMPORARY RESTRAINING ORDER: (A 74 CA 189) Argument of counsel. Court denies TRO.

11/4/74 In SA-74-CA-168, Pltf's RESPONSE TO COURT'S ORDER, filed.

11/5/74 In CA-6-345, Defts' BRIEF, filed.

11/13/74 In SA-74-CA-168, Pltf's BRIEF, filed.

11/13/74 In SA-74-CA-168, Deft's MOTION FOR INTRODUCTION OF EVIDENCE, filed.

11/13/74 In SA-74-CA-168, received Pretrial Order, Richard C. Dexter vs. Ted Butler, et al. (JVS) PRETRIAL ORDER, filed.

11/15/74 (JVS)(JI)(WMT) Oral arguments were held before the three judge court in CA-6-345 King Arts Theater Inc. vs. George E. McCrea et al; CA 3-74-130 Ellwest Stereo Theaters, Inc. vs. Donald Byrd, et al and SA-74-CA-168 Richard C. Dexter vs. Ted Butler, et al. Cases taken under advisement.

11/25/74 In CA-3-7347-C, APPELLANTS' BRIEF, filed.

12/2/74 IN CA 7-74-45, ENTRY OF DISMISSAL, filed November 25, 1974 in Northern District of Texas.

1/30/75 In SA-74-CA-315, Defts' MOTION TO DISMISS AND ANSWER, filed. M/D 2/10/75

1/30/75 In SA-74-CA-315, Defts' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, filed.

1/30/75 In SA-74-CA-315 DEfts' MEMORANDUM BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, filed.

1/30/75 In SA-74-CA-315, Defts' MOTION TO STRIKE FROM PLEADINGS ANY REFERENCE TO THE "PUSS 'N BOOTS CLUB", filed. M/D 2/10/75

2/6/75 (JRB) ORDER, filed and entered, consolidating SA-74-CA-315, McKenzie, et al vs. Ted Butler, et al with CA-73-H-528, filed January 28, 1975 in Western District.

2/20/75 COPY OF DECISION IN LOCKE V. STATE, 516 S.W.2d 949, submitted by Henry Wade, Criminal District Attorney of Dallas County, Texas, filed.

3/28/75 Received in SA-74-CA-315, Deft Ted Butler's ORIGINAL ANSWER TO PLAINTIFF'S ORIGINAL COMPLAINT, filed January 22, 1975 in Western District of Texas.

4/8/75 Received CA A-75-CA-34, Chris Gernon vs. Bob Simpson, et al file with Judge Brown's order consolidating with CA 73-H-528.

4/17/75 In B-74-142-CA, Sun Family Entertainment, Inc. vs. Hanna, Deft Harold R. Clayton's MOTION TO DISMISS, filed. M/D 5/12/78 by Clerk

5/13/75 In CA A-75-CA-34, Pltf's MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION, filed.

5/13/75 In CA A-75-CA-34, Pltf's BRIEF IN SUPPORT OF MOTION, filed.

5/16/75 (JVS) ORDER, filed and entered, in SA-74-CA-315, granting Defts' Motion to Strike for Plfts' Pleadings any Reference to the "Puss 'N Boot Club". The ruling on the motion to dismiss will not be made at this time since the court anticipates that an opinion which will affect the motion, will be shortly forthcoming. Parties ntfd. jb

6/4/75 In A-75-CA-34, Chris Gernon vs. Bob Miles, et al, Defts' MOTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION, filed.

6/4/75 In A-75-CA-34, Defts' BRIEF IN

SUPPORT OF MOTION, filed.

6/5/75 (JVS) ORDER, filed and entered, in CA B-74-142-CA, dismissing Judge Harold R. Clayton from the suit. Parties ntfd. jb

6/5/75 (JVS) ORDER, filed and entered, in CA A-75-CA-34, holding in abeyance the motion for temporary restraining order or preliminary injunction until the release of the forthcoming court's opinion. Parties ntfd. jb

7/3/75 (JI)(JVS)(WMT) OPINION AND ORDER, filed. (See instrument for details) Parties ntfd. rm. All consolidated files returned to court of origin.

8/1/75 State's NOTICE OF APPEAL TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, filed.

8/4/75 Defts Byrd and Southall's NOTICE OF APPEAL to Fifth Circuit, filed.

8/4/75 Defts Byrd and Southall's Notice of Appeal to U. S. SUPREME COURT, filed.

8/14/75 138 In SA-74-CA-168 and SA-72-CA-214's MOTION FOR RELIEF FROM JUDGMENT OR ORDER AND FOR CORRECTION OF JUDGMENT OR ORDER, filed. (Ted Butler, et al vs. Southland Theaters, Inc.)

8/21/75 139 In SA-75-CA-168 and SA-72-CA-214's MOTION FOR ENTRY OF SEPARATE JUDGMENT, filed.

8/25/75 140 Notice of Appeal on behalf of TED BUTLER, ET AL., in Civil Action NO. SA-72-CA-214 to FIFTH CIRCUIT, filed.

8/25/75 141 Notice of Appeal on behalf of TED BUTLER, ET AL., in Civil Action NO. SA-72-CA-214 to U.S. SUPREME COURT, filed.

8/29/75 142 (JVS) LETTER ORDER, filed, directing the substitution of corrected page 60 in the Opinion filed July 3, 1975. Copies mailed to all parties.

8/29/75 143 (JVS) ORDER (CA 73-H-1114), filed, remanding case to district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 144 (JVS) ORDER (CA-7-74-43), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 145 (JVS) ORDER (CA-7-74-65), filed, remanding the case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 146 (JVS) ORDER (CA-7-74-45), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 147 (JVS) ORDER (SA-74-CA-315), filed, remanding the case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 148 (JVS) ORDER (SA-74-CA-176), filed, remanding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 149 (JVS) ORDER (SA-73-CA-214), filed, remanding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 150 (JVS) ORDER (CA 3-7398-C), filed, remanding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 151 (JVS) ORDER (CA 3-7024-C), filed, remanding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 152 (JVS) ORDER (CA 3-7347-C), filed, re-

manding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 153 (JVS) ORDER (CA A-74-CA-189), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 154 (JVS) ORDER (CA A-74-CA-078), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 155 (JVS) ORDER (CA A-75-CA-34), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 156 (JVS) ORDER (B-74-142-CA), filed remanding case to the district judge in whose court the case was originally filed. Parties ntfd.

8/29/75 157 (JVS) ORDER (CA-4-74-29), filed, remanding case to the district judge in whose court the case was originally filed. Parties ntfd.

8/29/75 158 (JVS) ORDER (CA-4-74-45), filed, remanding case to the district judge in whose court the case was originally filed. Parties ntfd.

9/4/75 159 Deft. Ted Butler's Designation of Record to Court Reporter and U.S. Dist. Clerk, filed. (Copy furnished Ct. Reporter.)

9/4/75 160 Deft. Ted Butler's Motion for Suspension of Court's Final Orders and Permanent Injunction Pending Appeal, filed.

9/4/75 161 Brief in Support of Motion for Suspension of Court's Final Orders. Pending Appeal, filed.

9/10/75 162 Notice of Appeal on behalf of TED BUTLER, ET AL. to FIFTH CIRCUIT, filed.

9/10/75 163 Notice of Appeal on Behalf of TED BUTLER, ET AL. to U.S. SUPREME COURT, filed.

9/10/75 164 Cost Bond on Appeal, filed.

10/3/75 165 (COB) Order Extending time for docketing record on appeal, filed. (Copies to Ct. Appeals, Ct. Reporter & Attys)

10/3/75 166 In SA-74-Ca-168 and SA-73-CA-214, Defts' MOTION TO VACATE DECISION OF THREE-JUDGE COURT AND REMAND TO ORIGINATING COURT/ALTERNATIVELY MOTION TO RETRIEVE RECORD, filed.

10/7/75 167 Transcript of Proceedings, in Duplicate, filed. (In CA 3-74-130, Ellswest Stereo Theatres, Inc., vs. Donald Byrd, et al)

10/9/75 168 In SA-74-CA-168, Defts' SECOND MOTION FOR ENTRY OF SEPARATE JUDGMENT filed.

10/14/75 169 Stipulation for Dismissal of Appeal, filed.

10/14/75 170 (JVS) Order Dismissing Appeal, filed. (Attys notified) (As to Defts DONALD BYRD and MEL SOUTHALL, only)

10/15/75 171 SWORN AFFIDAVIT OF DOUGLAS C. YOUNG, with Exhibits, filed.

10/17/75 172 SUPPLEMENTAL SWORN AFFIDAVIT OF DOUGLAS C. YOUND, filed.

10/20/75 173 Defts' THIRD MOTION FOR ENTRY OF JUDGMENT/OR TO VACATE JUDGMENT in SA-74-CA-168 and SA-73-CA-214, filed.

11/3/75 174 Defts' FOURTH MOTION FOR ENTRY OF JUDGMENT/OR TO VACATE JUDGMENT in SA-74-CA-168, filed.

11/4/75 175 (JVS) FINAL JUDGMENT, filed and entered. In accordance with this court's memorandum opinion entered on July 3, 1975, it is ordered that the Texas statute designated as article 4667(a)(3) of Vernon's Annotated Civil Statutes is unconstitutional on its face in case CA-6-345, King Arts Theatre v. McRea. Also pursuant to same memorandum opinion having concluded that §16.01 of the Texas Penal Code was applied in an unconstitutional manner to the plaintiff Dexter, this court enjoins the state prosecuting pltf Dexter with regard to incidents occurring on June 24, June 28, and July 2, 1974. This injunction includes a restraint on any futhre prosecution of any motion picture exhibitor. This is in regards to SA 74-CA-168, Richard Dexter v. Ted Butler. In CA-3-74-130-E,

Ellwest Stereo Theatre, Inc. v. Donald Byrd, et al., in accord with this court's memorandum opinion, it is ordered that the language "Or commonly used in" in the Texas Statute designated as article 18.02(2) is unconstitutionally vague and overbroad and is unconstitutional as applied to Ellwest Stereo Theatres, Inc., etc., Parties ntfd. jb

11/11/75 176 Notice of Appeal to Fifth Circuit by Deft. Ted Butler, filed. (Copies mailed to Parties)

11/11/75 177 Notice of Appeal to Supreme Court by Deft. Ted Butler, filed (Copies mailed to Parties)

9/28/77 75-4312 Original Opinion of the United States Court of Appeals for the Fifth Circuit. Entered a reversal in one case (King Arts v. McCrea), and remanded in the other case (Dexter v. Butler).

12/1/77 75-4312 Petition for Rehearing and Petition for Rehearing En Banc granted.

12/18/78 75-4312 Opinion of Court of Appeals For the Fifth Circuit held that Art. 4667(a)(3) is unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films (reversing Judgment of the Panel of the Court of Appeals and affirmed Judgment of the District Court). Enter--Judgment Dates

1/15/79 75-4312 Notice of Appeal to the Supreme Court of the United States.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

KING ARTS THEATRE, INC.,	)(	
	)(	
Plaintiff,	)(	
	)(	
V.	)(	CIVIL ACTION
	)(	NO. SA-73-CA-214
GEORGE E. McCREA, County Attorney of Tom Green County; JOHN HILL, Attorney General of the State of Texas; and DOLPH BRISCOE, Governor of the State of Texas,	)(	
	)(	
Defendants.	)(	

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

1. Plaintiff is a corporation organized and doing business under the laws of the State of Texas and operates a motion picture theater in San Angelo, Tom Green County, Texas.

2. Defendant George E. McCrea is the County Attorney of Tom Green County, Texas; defendant John Hill is the Attorney General of the State of Texas and defendant Dolph Briscoe is the Governor of the State of Texas, both of whom are made parties hereto for purposes of giving notice as required by 28 U.S.C. §2284(2), and are sued herein only in their official capacities.

3. This is an action to redress the deprivation under color of state law of the rights, privileges or immunities secured to the plaintiffs by the Constitution of the United States. It is further an action under the Federal Declaratory Judgment Act, 28 U.S.C. §2201, seeking a

declaratory judgment that certain statutes of the State of Texas are unconstitutional on their face or as applied and seeking injunctive relief against the continued enforcement thereof against the plaintiff. This is further an action for a statutory court of three judges in accordance with the provisions of 28 U.S.C. §2281 and §2284.

4. Defendant John Hill as Attorney General of the State of Texas is charged with responsibility of enforcing the laws of the State of Texas in a lawful and legal manner and as such, has general supervision over various county attorneys of the State of Texas. Plaintiffs aver that any injunction against the Attorney General of the State of Texas would be binding also upon all those other law officials under the supervision and direction of said Attorney General so as to insure uniform application of the laws throughout the State of Texas.

5. This court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. §1343(3), §1343(4), 42 U.S.C. §1983 and §1985(3), and 28 U.S.C. §2201 and §2281.

6. The plaintiff for some period of time has been engaged in the operation of motion picture theaters in San Angelo, Tom Green County, Texas, and has been exhibiting motion pictures in an enclosed theater in which it has advertised that the films are for "adults only" so as not to thrust the films on an unwilling person. Admission is limited to adults and no minors are admitted to said theater. There is no pandering in the advertisements and the theaters are not intended to offend anyone. Plaintiff avers that there are similarly situated theaters in the State of Texas, and further that there are also establishments which offer for sale magazines and books for adults only and have motion picture theaters in connection therewith.

7. Plaintiff desires to continue to operate a motion

picture theater and to abide by all lawful provisions of law for the showing of motion pictures.

8. Plaintiffs aver that in light of the recent rulings of the United States Supreme Court on June 21, 1973 and June 25, 1973, in *Miller v. California, Paris Adult Theater I v. Slaton, Kaplan v. California, Heller v. New York, Roaden v. Kentucky, Alexander v. Virginia*, and others, that a great deal of confusion has been created in the field of materials protected or unprotected by the First Amendment. As a result of said rulings, various statements have been made by public officials in San Angelo County, including the defendant George E. McCrea, and various actions have taken place, known and unknown to the plaintiff, which may seriously affect their businesses.

9. Plaintiffs desire to abide by any specifically defined conduct in a lawful state statute as to what motion pictures and/or other materials protected by the First Amendment may contain but that in light of the confusion and the statements by the defendant, George E. McCrea, and others, there appears to be threatened action against them in the immediate future involving statutes stated herein, which statutes are unconstitutional on their face and as applied. Plaintiff avers that its lease has been cancelled as shown by the attached letter marked Exhibit A and incorporated herein by reference.

10. Plaintiff avers that as a person entitled to rights under the United States Constitution that the statutes herein are so vague and indefinite in the light of the rulings of the United States Supreme Court and are unconstitutional and void as a prior restraint and in violation of the First and Fourteenth Amendments as well as being vague and overbroad.

11. Plaintiff avers that it desires to continue to operate in a lawful manner motion picture theaters without interference, harrassment, or intimidation of

itself, its servants, employees, lessor or any other person connected with it by defendants or any other person acting under the color of law.

12. Plaintiff avers that because of the actions of the defendant and other public officials, including the statement that the defendant McCrea intended to act on the so-called nuisance statute for an injunction to close the theater, or any use of the term"obscene" in applying for a nuisance should not be permitted because under the existing Texas statute the plaintiffs could never be afforded fair notice of the prohibited activity, nor could others similarly situated.

13. Plaintiff avers that any action by the County Attorney on a nuisance theory pursuant to Articles 4666 and 4667 of Vernon's Annotated Civil Statutes of Texas and Article 513 of Vernon's Annotated Penal Code of Texas to close plaintiff's motion picture theater for one year is a flagrant and patent violation of express constitutional prohibitions which guarantee freedom of speech, due process and equal protection of the law under the First and Fourteenth Amendment and rights under the Fifth Amendment that no man's property may be taken without just compensation. Plaintiff avers that the personal property in the theaters is great and that the cancellation of the lease terminating the theater's right to operate constitutes irreparable harm and injury and has a chilling effect and plaintiff is entitled to declaratory judgment and injunctive relief declaring its rights under Articles 4666, 4667 and 513. Each motion picture shown in the future must be judged upon its own and the closing of a motion picture theater on the basis of showing allegedly obscene movies and the threat of contempt for the showing of any motion picture in the future is the most patent form of censorship and prior restraint.

14. Plaintiff avers that the use of the nuisance statute, Articles 4666 and 4667 of Vernon's Annotated

Civil Statutes which define a disorderly house as a motion picture theater showing obscene films as the term obscene is defined in the Penal Code and more particularly 513 of Vernon's Annotated Penal Code of Texas is unconstitutional on its face and cannot be constitutionally applied to a motion picture theater subject to First Amendment protection for the following reasons:

(a) The public nuisance law cannot be asserted against motion pictures since each particular motion picture must be judged upon its own and the denial of the right of the plaintiff to show a motion picture is prior restraint and in violation of the First and Fourteenth Amendments and Article 1, Section 8 of the Texas Constitution.

(b) The statutory provisions are an unconstitutional prior restraint on freedom of speech and expression and in violation of the First and Fourteenth Amendments.

(c) The use of a nuisance statute is tantamount to a censorship statute and the necessary provisions for any censorship statute are not included, which are: That each picture must be judged upon its own; the burden of proof is upon the alleged censor; and there must be a provision for maintaining the status quo, a prompt judicial hearing, and a prompt judicial determination.

(d) The said statutory provisions violate the First Amendment to the United States Constitution by utilizing the characterization of "nuisance" which is too general and indefinite and leaves to the Executive and Judicial Branches too wide a discretion in its application. For example, it authorizes the confiscation and restraint of non-obscene material simply because it happens to be in the presence of obscene material.

(e) The statutory provisions do not contain the minimum necessary procedural safeguards to offer

motion pictures protected by the First Amendment the protection to which they are entitled.

(f) The statutory provisions are too vague and indefinite to be applied to the First Amendment rights.

(g) The statutory provisions are over broad and void for vagueness.

(h) The statutory provisions lack the necessary scienter provisions requisite to the regulation of allegedly obscene material

(i) The statutory provisions deny constitutionally requisite procedural protection for non-obscene materials, in that they provide that the person alleged to be maintaining a nuisance come forward with evidence and maintain the burden of proof that he does not maintain a nuisance, and do not provide for an expeditious rendering of judgment by the trial court or for expeditious appeal and final judgment.

(j) The statutory provisions deny free speech the protection to which it is entitled by providing that evidence of the general reputation of the business shall be admissible into evidence, and judgment may be based on the general reputation so proven.

(k) The said statutory provisions are repugnant to the due process clause of the Fourteenth Amendment because the concept of public nuisance is too broad and too vague a term to proscribe activity as beyond the First Amendment protection.

(l) The said statutory provisions fail to guarantee prompt final judicial determination of the First Amendment issue involved in cases concerning motion pictures.

(m) The said statutory provisions seek to achieve ends by means which sweep unnecessarily broadly and

thereby invade the area of protected First Amendment freedoms.

(n) The said statutory provisions do not contain necessary procedural safeguards for the protection of free speech in that they do not assure the plaintiff an opportunity to marshal his evidence in his defense adequately prior to the judicial hearing required.

(o) The statute places the burden of possible contempt action upon the plaintiff if it seeks to show any motion picture in the future if a court should find a nuisance exists because of the showing in the past of an obscene motion picture film.

(p) The term "obscene" as defined in the Texas statute is vague and indefinite and unconstitutional on the grounds of void-for-vagueness and overbreadth and upon the further grounds set forth hereafter, and therefore cannot be used in the nuisance statute.

(q) The statute is in violation of the Fifth Amendment in that no man's property shall be taken without just compensation.

15. Plaintiffs aver that the Texas "disorderly house" statute, Article 513 is unconstitutional on its face and as applied on the following grounds:

(a) The statute including the definition of obscenity is void for vagueness.

(b) The statutes are void for overbreadth.

(c) The statutes are void for vagueness in that they fail to provide adequate notice to persons of the type of conduct that the statute prohibits from dissemination in that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

(d) The statue is void for vagueness in that stricter

standards of permissible statutory vagueness must be applied to a statute potentially inhibiting free speech.

(e) The statute is void for vagueness in that the definition of obscenity is not drawn as narrowly as possible so as to minimize interference with protected expression.

(f) The statute is void for vagueness in that it fails to adequately incorporate procedures that insure against the curtailment of constitutionally protected speech.

(g) The statute is unconstitutional and void in that it has been rejected in toto by both majority and minority opinions of the United States Supreme Court and "abandoned as unworkable by its author and no member of the (Supreme) Court today supports the *Memoirs* formulation" which is the Texas statute.

(h) The statute fails to *specifically* define by applicable state law the sexual conduct which is prohibited.

(i) The Texas statute is unconstitutional in that sexual conduct is not specifically defined by the regulating state law as written and said state law is incapable of any construction to uphold its constitutionality.

(j) The statute provides no procedural safeguards and is a prior restraint, therefore, and an abridgement of freedom of speech in violation of the First and Fourteenth Amendment.

(k) The statutes are a prior restraint in violation of First Amendment freedoms and an attempt to force motion picture operators and plaintiff to work as unpaid censors of what Texans are to be allowed to see.

(l) The statutes fail to require an affirmative showing of specific scienter relating to the obscene

nature of the material in the constitutional sense.

(m) The statute on its face is repugnant to the due process clause and no specification of the details of the offense intended to be charged can serve to validate it.

16. Plaintiff avers that if said statutes as threatened to be enforced against the plaintiff and others similarly situated are enforced that the conduct will cause them irreparable harm and injury and deprive the plaintiffs of their rights, privileges and immunities secured by the Constitution.

17. Plaintiff further avers that a similar nuisance statute has beed declared unconstitutionally void by a three-judge District Court sitting in the Northern District of Ohio in *Pursue Ltd., et al v. Lawrence S. Huffman*, and that a stay of the order of the Court has been denied by the United States Supreme Court and a copy of said opinion is attached and incorporated herein.

18. Plaintiff avers that the statutes herein should be declared unconstitutional and void and the defendants enjoined if necessary.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That the defendants be required to answer this complaint in conformity with the rules and practices of this Honorable Court.

2. For a declaratory judgment that the Texas statutes, Articles 4666 and 4667 of the Civil Code and 513 of the Penal Code be declared unconstitutional on their face or that said statutes cannot be constitutionally applied to a motion picture theater.

3. That this Court issue a preliminary and a permanent injunction restraining and enjoining the defendants, their agents, servants, and employees from

enforcing the Texas Statutes, Articles 4666 and 4667 of the Civil Code, and Article 513 of the Penal Code.

4. That a statutory court of three judges be convened to hear this cause.

5. That the plaintiff have such other, further and general relief as it may be entitled to in the premises.

J. Mack Ausburn

Frierson M. Graves, Jr.

Attorneys for Plaintiff

OF COUNSEL:
HEISKELL, DONELSON,
ADAMS, WILLIAMS &
WALL
2020 First National Bank Bldg.
Memphis, Tennessee 38103

LOGAN, LEAR, MASSEY & GOSSET
ATTORNEYS AT LAW
FOURTH FLOOR, PETROLEUM BUILDING
SAN ANGELO, TEXAS 76901

Ralph Logan
Tom Lear
Tom C. Massey
Greg Gossett
George W. Harrison
Gregg Owens

P.O. Drawer 911
Telephone (915) 605-0119

October 30, 1973

King Arts Theatre, Inc.
c/o Trademark Theatres, Inc.
830 So. Cooper Street
Memphis, Tennessee 38104

Gentlemen:

We represent Modern Home Builders Corporation; in fact, the president of this corporation, T. R. Logan, is the father of the writer.

Mr. George E. McCrea, the Tom Green County Attorney, has contacted Modern Home Builders and advised that in view of the number of complaints he has had concerning the pornographic pictures displayed at your theaters here, he intends to bring application for an injunction to prohibit future showing of illegal films. Of course, such an application would have to join Modern Home Builders Corporation, and since my father is advanced in years I do not want him to have to be embarrassed over this matter and neither does he want to have his corporation joined in such a suit.

We believe that Paragraph 3rd of your lease contract requires compliance with all requirements imposed by the police departments for the correction, prevention and abatement of nuisances in, upon or connected with

said premises. Modern Home Builders Corporation is, therefore, terminating your lease as of November 15, 1973. We trust that you will advise that you will give possession of the buildings by that date.

Very truly yours.

LOGAN, LEAR, MASSEY
& GOSSETT

Ralph Logan

RL:LT

EXHIBIT A

LOGAN-FORD COMPANY
REALTORS
FIRE INSURANCE, PROPERTY MANAGEMENT,
LOANS
30 WEST TWOHIG AVENUE

SAN ANGELO, TEXAS
76901

February 8, 1972

KING ARTS THEATRE, INC.

We hereby agree to transfer the lease on the building at 20 West Concho Street, San Angelo, Texas, the lease being dated 15 October, 1970 and ending 14 October, 1976.

We hereby agree to transfer this lease to you as of 15 February, 1972.

Signed,

MODERN HOME BUILDERS CORPORATION

By:

TRL:
President

STATE OF TEXAS)(
)(KNOW ALL MEN BY
)(THESE PRESENTS:
COUNTY OF TRAVIS)(

THAT, Charles Eikel Blumb, of the County of Tarrant, State of Texas, individually and acting as President of Texas Cinne Arts Inc., for and in the consideration of the sum of Ten Dollar, ($10.00) and other good and valuable consideration to me in hand paid by Ball Theatre Inc., King Arts Inc., San Angelo, King Arts Inc., San Antonio, and Texas Arts Theatre Inc. the receipt of which is hereby acknowledged, have this day Sold, Conveyed, Transferred and Assigned and by these presents do Sell, Convey, Transfer and Assign unto the said Ball Theatre Inc., King Arts Inc., San Angelo, King Arts Inc., San Antonio, and Texas Arts Theatre Inc. four (4) certain lease agreements described as follows:

(A) A lease dated 5th August, 1970, between GKM Properties, a partnership and Texas Cinne Arts Inc. covering premises known as 232 Broadway, and being a part of Lots 4, 5, and 6, Block 24, NCB 421, in the City of San Antonio, Bexar County, Texas, and formerly occupied by the John Herwick Company:

(B) A lease dated 30th of June, 1971 between O. L. Nelms and Charles E. Plumb, covering premises known as 2515 West Jefferson Blvd., Grand Prairie, Texas, and being the southermost corner of that certain building designated as 2515 West Jefferson Blvd. being 20 foot wide and 100 feet deep:

(C) A lease dated the 28th day of August, 1970, between Modern Home Builders Corp. and King Arts Theatre covering premises known as 20 East Concho Street, San Angelo, Texas:

(D) A lease dated 1st of July, 1970, between George

Plomarity and Texas Cinne Arts Inc. covering premises known as 805-807 North Chaparral. Lease expires on July 31, 1978. AND we do further Grant, Sell and Convey unto the said Ball Theatre Inc., King Arts Inc., San Angelo, Texas, King Arts Inc., San Antonio, Texas, and Texas Arts Theatre Inc. all the rights, title interest in the name, reputation and good will of said theatres.

TO HAVE AND TO HOLD unto the said Ball Theatre Inc., Flag Arts Inc., San Angelo, Texas, King Arts Inc., San Antonio, and Texas Arts Theatre Inc. and their successors, heirs and assigns, the above described leases together with any and all rights, equities, remedies, privileges, titles and interest in and to said land which we have by virtue of being the legal holders and owners of said leases.

EXECUTED this 11th day of February, 1972.

CHARLES E. PLUNS - INDIVIDUALLY

CHARLES E. PLUNS
PRESIDENT OF TEXAS CINNE ARTS INC.

STATE OF TEXAS)(
)(KNOW ALL MEN
COUNTY OF TOM)(BY THESE
GREEN)(PRESENTS:

THIS AGREEMENT OF LEASE, Made this 28 day of August A.D. 1979 by and between MODERN HOME BUILDERS CORPORATION, known herein as LESSOR, and KING ARTS THEATRE, known herein as LESSER.

(The terms "Lessor" and "Lessee" shall be construed in the singular or plural number according as they respectively represent one or more than one person.)

WITNESSETH, That the said Lessor does by these presents lease and demise unto the said Lessee the following described property, to-wit: Lying and being situated in San Angelo, County of Tom Green, State of Texas, and being 20 East Concho Street, San Angelo, Texas.

for the term of Three years with option of three years beginning the 15th day of October A.D., 1970 and ending the 14th day of October A.D., 1976 paying therefor the sum of Forth Five Hundred & No/100 ($4,500.00) DOLLARS, payable first and last month's rent, the sum of $250.00, with rent payable on the 15th day of each month thereafter.

upon the conditions and covenants following:

First, that Lessee will well and PUNCTUALLY pay said rents in manner and form as hereinbefore specified, and quietly deliver up said premises on the day of the expiration of this lease, in as good condition as the same were in when received, reasonable wear and tear thereof excepted.

Second, That the said premises shall be used for King Arts Theatre and for no other purpose.

Third, That Lessee will not sub-let said premises, or any part thereof, to any person or persons whatsoever, without the consent of said Lessor, IN WRITING, thereto first obtained.

Fourth, That on failure to pay the rent in advance, as aforesaid, or comply with any of the foregoing obligations, or in violation of any of the foregoing covenants, the Lessor may declare this lease forfeited at their discretion and agent or attorney shall have the power to enter and hold, occupy and repossess the entire premises hereinbefore described, as before the execution of these presents.

NOTE: Formal Execution And Acknowledgement Portions Of Lease Are Omitted.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

SAN ANGELO DIVISION

KING ARTS THEATRE, INC., Plaintiff	)(	
V.	)(	CIVIL ACTION NO. CA-6-345
GEORGE E. McCREA, County Attorney of Tom Green County; JOHN HILL, Attorney General of the State of Texas; and DOLPH BRISCOE, Governor of the State of Texas, Defendants	)(	

DEFENDANTS' JOINT ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME the Defendants in the above entitled and numbered cause, represented herein by John L. Hill, Attorney General of Texas, and file this their Original Answer and in support thereof would show unto the Court:

I.

Defendants deny that the Plaintiff is a corporation organized and doing business under the laws of the State of Texas and operates a motion picture theater in San Angelo, Tom Green County, Texas.

II.

Defendants admit that the named party Defendants are acting in their official capacities as set out in Plaintiff's numbered paragraph 2 but Defendants deny

any participation other than that in their official capacities.

III.

The allegations of numbered paragraph 3 of Plaintiff's complaint are admitted as to the provisions of law cited, but are denied insofar as it is alleged that there has been any deprivation by Defendants of any right, privilege or immunity secured by the Constitution or laws of the United States.

Defendants deny that jurisdiction exists in this Court for the granting of declaratory judgment pursuant to Title 28 U.S.C. §2201 or for the convening of a three-judge court under the provisions of Title 28 U.S.C., §2281 and §2284.

IV.

The Defendant John L. Hill admits that he is the Attorney General of the State of Texas and that he is charged with the responsibility of enforcing the laws of the State of Texas in a lawful and legal manner. However, he denies that he has general supervision over the various county attorneys of the State of Texas or that any injunction against the Attorney General of the State of Texas would be binding upon any other law officials of the State of Texas in the performance of their duties in the enforcement of the laws of this state.

V.

The Defendants deny that jurisdiction exists in this honorable court under Title 42 U.S.C. §1983 and 28 U.S.C. §1343(3)(4) and §1985(3). Defendants again deny that jurisdiction exists in this court for the granting of declaratory judgment pursuant to Title 28 U.S.C., §2201 for the convening of a three-judge federal court under Title 28 U.S.C., §2281.

VI.

Defendant is not in any position to know whether the Plaintiff herein operates a motion picture theater in San Angelo, Texas and cannot, therefore, admit nor deny the allegations set out in paragraph 5 of Plaintiff's complaint.

The Defendants admit that there is a theater in San Angelo, Texas, exhibiting "adult-type" movies; but Defendants deny that admission is limited to adults and that no minors are admitted to said theater and furthermore deny that there is no pandering in Plaintiff's advertisement for its theater.

Defendants can neither admit nor deny that there are similarly situated theaters in the State of Texas although Defendants admit that there are other theaters exhibiting similar matter.

VII.

Defendants admit Plaintiff's desire to continue operation of motion picture theaters. However, Defendants deny Plaintiff's desire to abide by all lawful provisions for the showing of motion pictures.

VIII.

The Defendants can neither admit nor deny most of the allegations in paragraph 7 of Plaintiff's original complaint because of the vagueness under which the allegations are drafted. The Defendant, George E. McCrea, admits that he has made certain statements regarding his intention to enforce the laws of the State of Texas in his jurisdiction.

IX.

The Defendants deny in toto the allegations in paragraph 9 of Plaintiff's original complaint.

X.

The Defendants say that they do not know which statutes are referred to in paragraph 10 of Plaintiff's original complaint but deny that any of the statutes relating to the prosecution of obscenity have been held to be so vague and indefinite as to be unconstitutional and void as a prior restraint and therefore violative of the First and Fourteenth Amendments of the Constitution of the United States.

XI.

Defendants do not deny that Plaintiff desires to continue operation of its motion picture theater; however, Defendants do deny that the Plaintiff wishes to continue operation in a lawful manner.

XII.

Paragraph 12 of the Plaintiff's original complaint is so vague and indefinite that Defendants can neither admit nor deny the allegations contained therein. However, The Defendant, McCrea, does intend to seek an injunction in the state courts of the State of Texas in an effort to terminate the unlawful activities of the Plaintiff in showing obscene material in a theater located in Tom Green County, Texas. The Defendants deny that Plaintiff can never be afforded fair notice of the prohibited activity which is sought to be restrained.

XIII.

The Defendants deny the assertions contained in paragraph 13 of Plaintiff's complaint. In this connection the Defendants would show that it is impossible to institute legal proceedings to terminate the unlawful activities of Plaintiff's prior to January 1, 1974. The Defendants would further show that on January 1, 1974, Article 4667, Vernon's Annotated Civil Statutes and Article 512, Vernon's Annotated Penal Code will be

repealed and that such statutes will be replaced by acts of the 63rd Legislature of the State of Texas. Article 4667, Vernon's Annotated Civil Statutes was amended by the 63rd Legislature to read as follows:

> "Article 4667, Revised Civil Statutes of Texas, 1925, as amended, is amended to read as follows:
>
> '(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:
>
> '(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;
>
> '(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;
>
> '(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;
>
> '(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;
>
> '(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.

'(b) Any person who may use or be about to use, or who may be a party to the use of any such promises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of."

Article 513, Vernon's Annotated Penal Code has been repealed by the 63rd Legislature and the pertinent provisions thereof are now contained in Section 43.21 of the new Texas Penal Code which was adopted by the 63rd Legislature. Sections 43.21 read as follows:

"In this subchapter:

(1) 'Obscene' means having as a whole a dominant theme that:

(A) appeals to a pruriant interest in sex, nudity, or exception;

(B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and

(C) is utterly without redeeming social value.

(2) 'Material' means a book, magazine, newspaper, or other printed or writtin material: a picture, drawing, photograph, motion picture, or other material representation; a statute or other figure; a recording, transcription or mechanical, chemical, or electrical ; or other

article, equipment, or machine.

(3) 'Prurient interest' means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appeas from the character of the material or the circumstances of its dissemination that the subject matter is designed for a s susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) 'Distributed' means to transfer possession, whether with or without consideration.

(5) 'Commercially distribute' means to transfer possession for valuable consideration."

The Defendant, McCrea, states that it is his intention to seek an injunction in the state courts of the State of Texas in an effort to terminate the unlawful activities of Plaintiff in accordance with the provisions of the above quoted portions of the newly enacted Texas statutes.

XIV.

Defendants deny Plaintiff's allegations set out in paragraph 14 (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q).

XV.

The Defendants say that inasmuch as Article 513, Vernon's Annotated Penal Code has now been replaced by Section 43.21 of the new Texas Penal Code that the allegations contained in paragraph 15 of Plaintiff's complaint are no longer applicable. Insofar as the remaining contentions of paragraph 15 of Plaintiff's complaint are concerned and insofar as they are relevant to the language of Section 43.21, they are denied.

XVI.

The Defendants admit only that they are sworn to enforce and prosecute all violations of existing valid laws of the State of Texas and have made statements to that effect, and in their official capacities will continue to enforce and prosecute such laws. The Defendants deny that the enforcement and prosecution of such laws as they relate to the unlawful activities of Plaintiff will deprive him of any rights, privileges or immunities secured by the Constitution of the United States.

XVII.

The Defendants deny that the Ohio Nuisance Statute spoken of in *Pursue Ltd., et al v. Lawrence S. Huffman* is in any manner, shape or form similar to Articles 4666 and 4667 of Vernon's Annotated Civil Statutes. The Defendants deny that the statute cited in the Plaintiff's original complaint are unconstitutional and void and say that they should not be enjoined in the enforcement of these laws of the State of Texas.

XVIII.

The Defendants say that Plaintiff is engaged in the unlawful activity of exhibiting "obscene material" as that term is defined in Article 513, Vernon's Annotated Penal Code and as defined in Section 43.21 of the new Texas Penal Code to become effective on January 1, 1974. Defendants anticipate that the lessor of the premises on which Plaintiff's theater is located will pursue his intentions to cancel the lease on said premises. Failing this Defendant McCrea will continue his efforts to enjoin Plaintiff from the further showing of "obscene materials" in Tom Green County, Texas.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that this Honorable Court refuse and deny any and all relief sought by Plaintiff,

and that this Court find that it has not acquired jurisdiction under the statutes cited in Plaintiff's complaint; that it further find Plaintiff has not shown itself entitled to any federal relief as prayed for in the complaint.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

MAX P. FLUSCHE, JR.
Assistant Attorney General

Attorneys for Defendants

P.O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Max P. Flusche, Jr., Assistant Attorney General of Texas, Attorney for Defendants, do hereby certify that a copy of the above and foregoing Defendants' Joint Original Answer has been deposited in the United States Mail, postage prepaid, certified on this the 21st day of December, 1973 to the following address: Frierson M. Graves, Jr., Heiskell, Donelson, Adams, Williams & Wall, 2020 First National Bank Bldg., Memphis, Tennessee 38103.

MAX P. FLUSCHE, JR.
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

KING ARTS THEATRE, INC.,	)(	
	)(	
Plaintiff	)(	
	)(	
V.	)(	CIVIL ACTION
	)(	NO. 6-345
GEORGE E. McCREA, et al,	)(	
	)(	
Defendants.	)(	

AMENDMENT TO COMPLAINT

Comes now the plaintiff and amends the Complaint by adding before the prayer the following paragraphs and the addition to the prayer as follows:

19. Plaintiff avers that effective January 1, 1974, Article 4667 of the Revised Civil Statutes of Texas will be amended in pertinent part as follows:

> "(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:
>
> "(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;"

Plaintiff further avers that still in effect will be Articles 4665 and 4666 of the Texas Penal Code providing for the abatement of the nuisance as set forth in Article 4667. Plaintiff further avers that Article 513 will be repealed as well as Article 527 and that in their place and stead for the definition of obscenity will be

that definition set forth in §43.21 which in pertinent part is as follows:

> "Sec. 43.21. Definitions
>
> In this subchapter:
>
> (1) 'Obscene' means having as a whole a dominant theme that:
>
> (A) appeals to a prurient interest in sex, nudity or excretion;
>
> (B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and
>
> (C) is utterly without redeeming social value."

20. Plaintiff avers that irreparable harm and injury will result if as set forth in the answer of defendants the defendants attempt to enjoin the use by the plaintiff or its motion picture theater as a public nuisance and that the enforcement of 4667 as amended using the definition of obscenity in §43.21 is unconstitutional or unconstitutional as applied on the same grounds as set forth in Paragraphs 13, 14, 15 and 16 of the original Complaint and plaintiff relies on said grounds that the amended statutes and new statutory definition is unconstitutional and void and the defendants should be enjoined and the statues declared unconstitutional.

21. Plaintiff avers that the threat of such action and the conduct of one or more of the defendants in attempting to secure a cancellation of plaintiff's lease is irreparable harm and injury requiring this Court to declare the statutes unconstitutional and void.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays additionally as follows:

6. For a declaratory judgment that Texas Statute Article 4667, as amended, and Section 43.21 defining obscenity to be used in applying Article 4667, be declared unconstitutional on their face and that said nuisance statute with definitions of obscenity contained in §43.21 cannot be constitutionally applied to a motion picture theater.

7. That the Court issue a preliminary and a permanent injunction restraining and enjoining the defendants, their agents, servants and employees, from enforcing the Texas Statute, Articles 4666, 4667 as amended of the Civil Code, and Section 43.21 of the Criminal Code as effective January 1, 1974.

8. That this Court issue a temporary restraining order enjoining the defendants, their agents, servants and employees, from instituting suit or attempting to enforce the Texas statutes, Articles 4666, and 4667 of the Civil Code as amended, and to attempt to use the definition of obscenity in §43.21 to enforce said statutes alleging a nuisance against the plaintiff's operation of its theater.

Attorney for Plaintiff

OF COUNSEL:
HEISKELL, DONELSON,
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MR. J. MACK AUSBURN
Attorney at Law
702 San Antonio Savings Bldg.
San Antonio, Texas 78205

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

KING ARTS THEATRE, INC.,	)(	No. CA 6-334
	)(	
Plaintiff,	)(	(1) District Judge:
	)(	Honorable John V.
	)(	Singleton, Jr.
	)(	
	)(	Southern District of Texas
	)(	
VS.	)(	(2) District Judge:
	)(	Honorable W.M. Taylor, Jr.
	)(	Northern District of Texas
	)(	
GEORGE E. McCREA,	)(	
County Attorney of Tom	)(	(3) Circuit Judge:
Green County, et al,	)(	Honorable Joe Ingraham
Defendants.	)(	
	)(	(4) Date of Order:
	)(	January 29, 1974

All Judges consenting, I, John R. Brown, Chief Judge of the Fifth Circuit, having been notified that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, hereby designate Circuit Judge Joe Ingraham and District Judges John V. Singleton, Jr. and W. M. Taylor, Jr. to serve as members of and to constitute the Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the

presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial on the merits, or otherwise, as that Court thinks appropriate.

JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

SAN ANGELO DIVISION

KING ARTS THEATRE, INC.,	)(	
	)(	
Plaintiff,	)(	
	)(	
VS.	)(	CIVIL ACTION NO. 6-345
	)(	
GEORGE E. McCREA, et al.,	)(	
	)(	
Defendants.	)(	

MEMORANDUM

The above-entitled and numbered cause has been heard by this court regarding the propriety of issuing a temporary injunction against the defendants. In the meantime, upon request by this judge, and upon motion of all parties, a three-judge court has been constituted composed of Circuit Judge: Honorable Joe Ingraham; District Judge: Honorable William M. Taylor, Jr.; and District Judge: Honorable John V. Singleton, Jr.

The above cause of action has been consolidated with other cases pending before the three-judge court so constituted.

It appears to the court that it would be inappropriate for a judge, who is not a member of the panel to hear the consolidated action, to issue any further orders and therefore no injunctive relief will be granted or ordered by the undersigned judge. This order will, of course, not in any way prevent the issuance of such injunctive relief by the three-judge court panel or any member thereof if deemed appropriate and this order does not pass on or adjudicate the merits of any injunctive relief.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 4th day of February A.D. 1974.

HALBERT O. WOODWARD
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

JOE C. COOK, ET AL,	)(	
	)(	
Plaintiffs,	)(	
	)(	
VS.	)(	SA-74-CA-176
	)(	
EMIL PETERS, ET AL,	)(	
	)(	
Defendants.	)(	

(1) District Judge: Honorable John V. Singleton, Jr. Southern District of Texas

(2) District Judge: Honorable William M. Taylor, Jr. Northern District of Texas

(3) Circuit Judge: Honorable Joe Ingraham

(4) Date of Order: August 6, 1974

All Judges having consented, the application of the Honorable John H. Wood, Jr., the requesting Judge, for designation of a three-judge court, is to be consolidated for submission and hearing with the following cases now pending in the United States District Court for the Northern, Southern, Eastern, Western Districts of Texas:

Southern District:	No. 73-H-528
	No. 73-H-586
	No. 73-H-1114
Western District:	No. SA-73-CA-214
	No. 74-CA-78
	No. SA-74-CA-168

Northern District: No. 3-7024-C
No. 3-7437-C
No. 3-7398-D
No. CA-6-345
No. CA-4-74-45
No. CA-3-74-130

Eastern District: No. B-74-142-CA

As Chief Judge of the Fifth Circuit, I hereby designate John V. Singleton, Jr. and William M. Taylor, Jr., United States District Judges of the Southern & Northern Districts of Texas and Joe Ingraham, United States Circuit Judge, as members of and to constitute the Court to herein determine the action. Whether separate or consolidated decrees are to be entered will be left to the determination of the three-judge court.

This designation and composition of the three-judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-judge rather than a one-judge court. This matter is best determined by the three-judge court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-judge panel either preliminarily or on the trial of the merits or otherwise as that Court thinks appropriate.

JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNIVERSAL AMUSEMENTS	)(	
	)(	
V.	)(	CIVIL ACTION NO.
	)(	73-H-528
CAROL VANCE, ET AL.	)(	

ORDER

A pretrial conference was held on August 12, 1974, in each of the following cases which are carried under the above style and number:

Universal Amusements v. Vance, C.A. 73-H-528 (Houston)

Hargrove v. Hill, et al., C.A. 73-H-1114 (Bryan)

Ellwest v. Walls, CA-4-74-45 (Ft. Worth)

Cinema X v. Curry & Walls, CA4-74-28 (Ft. Worth)

Southland Theatres v. Butler, SA 73-CA-214 (San Antonio)

San Antonio Book Mart v. Smith, A-74-CA-078 (Austin)

Sun Family Entertainment v. Hanna, B-74-142 CA (Beaumont)

Dexter v. Butler, SA 74-CA-168 (San Antonio)

King Arts Theatre, Inc. v. McCrea, CA-6-345 (Lubbock)

Associated Theatres v. Wade, CA 3-7347 (Dallas)

Jones v. Dyson, CA-3-7024-C (Dallas)

Associated Theatres v. Dyson, CA-3-7398-C (Dallas)

Cook v. Peters, SA 74-CA-176 (San Antonio)

Ellwest v. Byrd, CA 3-74-130 (Dallas)

In *Dexter v. Butler*, SA 74-CA-168, *King Arts Theatres v. McCrea*, CA 6-345, and *Ellwest v. Byrd*, CA3-74-130, it is hereby ordered:

That on or before September 6, 1974, at 5:00 p.m., the parties in each case will file an agreed pretrial order, the form of which the court designated at the conference.

That on or before October 4, 1974, at 5:00 p.m., the parties in each case will file briefs concerning the legal issues presented in each case.

In the rest of the above-styled-and-numbered cases a temporary injunction has been or will be entered pending the final disposition of these cases by a three-judge federal court.

DONE at Houston, Texas, on this the 20th day of August, 1974.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNIVERSAL AMUSEMENT COMPANY, INC., et al.,	)(	NO. CA-73-H-528
V.	)(	
CARROLL VANCE, et al.,	)(	
KING ARTS THEATRE, INC.	)(	
V.	)(	NO. CA-6-345 (Lubbock)
GEORGE E. McCREA, et al.	)(	

PRE-TRIAL ORDER

This pre-trial order is the result of the pre-trial conference of August 12, 1974, by which this cause of *King Arts Theatre, Inc. v. George E. McCrea, et al.* was on of three selected for issues to be presented before a consolidated hearing of a three-judge district court.

APPEARANCE OF COUNSEL

1. King Arts Theatre, Inc.

   Frierson M. Graves, Jr.
   2020 First National Bank Bldg.
   Memphis, TN 38103 901/525-8231

2. George E. McCrea, et al.

   Max P. Flushe, Jr.
   Assistant Attorney General
   P.O. Box 12548, Capitol Station
   Austin, Texas 78711 512/475-3281

STATEMENT OF THE CASE

In October, 1973, the King Arts Theatre, Inc. was

operating a motion picture theater for adults only in an enclosed theater in San Angelo, Texas, showing sexually explicit films which it believed to be commercially acceptable. On October 30, 1973, as shown by Exhibit A to the complaint, a notice was received from the landlord terminating the lease of the property as of November 15, 1973, and conveying information that the defendant George E. McCrea, the County Attorney, had contacted the landlord stating he intended to bring an application for an injunction as a nuisance to prohibit the future showing of allegedly pornographic pictures displayed at the theater. This suit was filed by the plaintiff on approximately November 12, 1973, requesting declaratory judgment and injunctive relief as set forth in the contested issues of law. The defendants answered the lawsuit and a hearing was held in which defendants admitted that the landlord had been contacted and further admitted that the County Attorney intended to bring such nuisance action. The answer further stated that the County Attorney intends to seek an injunction based on nuisance in the state courts in an effort to terminate what he considers unlawful activities of the plaintiff in showing obscene material in the theater located in Tom Green County. The answer stated and it was repeated at the time of the hearing of this cause that the previous statute had been repealed and that the new nuisance statute and obscenity statute was in effect. The defendant County Attorney had relied upon the old nuisance statute and now intended to rely upon the new nuisance and obscenity statutes to pursue his intentions to cancel the lease on the premises and would continue his efforts to enjoin the theater from showing of allegedly obscene materials in the theater by the use of said statutes.

JURISDICTIONS

The parties agree that the Court has full and complete jurisdiction of the subject matter and the parties.

MOTIONS

The only pending motion is the motion for preliminary injunction which would be disposed of by the hearing before the Court.

CONTENTIONS OF THE PARTIES

Plaintiff

The plaintiff, as the operator of a motion picture theater in San Angelo admitting persons over 18 only and showing "adult only" films which are sexually explicit, contends that the showing of unnamed motion picture films in the future cannot be enjoined as a nuisance.

It contends that each motion picture must be judged upon its own merits and upon exhibition any proper law may be used to punish exhibition.

It contends that the use of a nuisance statute to stop the showing of unnamed films in the future is not proper and is a prior restraint.

Any injunction would be improper if it enjoined the showing of any film as "obscene" because the injunction would be too vague and indefinite. It would further be an improper prior restraint to enjoin motion pictures which contained any named conduct such as sexual intercourse since sexual intercourse is not of itself obscene but must still meet the test of appealing to the prurient interests, patently offensive as affronting contemporary community standards and utterly without redeeming social value.

The plaintiff further contends that the fact that it showed sexually explicit films in the past cannot be the grounds for the maintenance of a nuisance action which would abate the use of the property as a motion picture theater showing adult films in the future for a period of one year as provided under the nuisance statute, Article 4666.

The plaintiff contends that the use of the nuisance statute, Articel 4666 and 4667, as originally passed and as amended, is an unconstitutional application of the law. The plaintiff further contends that under the new amended nuisance statute, Article 4667 the District Attorney or County Attorney can still bring a nuisance action to enjoin such commercial exhibition of obscene material which is unconstitutional or an unconstitutional application of the law.

The plaintiff contends that "obscene" is now defined under the new Texas Statute, Section 43.21 and that such statute is unconstitutional on its face and as applied in that the statute fails to specifically define by applicable state law as written or authoritatively construed the sexual conduct which is prohibited. It is therefore vague and indefinite and it fails to give adequate fair notice.

Defendant

The defendant contends that the plaintiff for a long period of time has been showing sexually explicit motion pictures which are obscene to adults as defined by Texas law as written or as authoritatively construed.

The defendant contends that on the basis of the past conduct of showing such sexually explicit movies which are obscene and the indication that such conduct will continue indefinitely in the future a nuisance exists under applicable Texas law.

The defendant contends that under Article 4666 and Article 4667 prior to amendment January 1, 1974, that the theaters constituted a disorderly house as defined in Article 513 so as to authorize the County Attorney to bring a suit for a nuisance to enjoin the showing of future obscene movies or movies containing such sexually explicit conduct which in and of itself is hardcore pornography as defined by applicable law.

The defendant further contends that Article 4667 as amended now specifically provides that a nuisance may be abated by the habitual use, actual, threatened or contemplated for the commercial exhibition of obscene materials.

The defendant contends that the motion picture theater here involved is a public nuisance as contemplated by the statutes and the the material shown is obscene as defined by the new Texas statute, Section 43.21.

The defendant contends that the obscenity statute and more particularly the definition thereof in Section 43.21 is constitutional on its face and as applied. While sexual conduct is not specifically spelled out in the statute, the statute as authoritatively construed heretofore by the Texas courts is constitutional and the plaintiff has fair notice of what is prohibited by said statute.

The defendant contends that the nuisance statutes may be applied as provided in the statute.

ADMISSIONS OF FACT

The parties stipulate and admit as follows:

1. The theater was operating.

2. There was an attempted cancellation of the lease a the suggestion of the County Attorney.

3. The County Attorney intended to enforce the law by bringing a nuisance action under Section 4666 and 4667 of Vernon's Annotated Civil Statutes but because of the Federal Court action and the request for an injunction and setting of the hearing did not bring such action but withheld action until the Court ruled.

4. On January 1, 1974, an amended Article 4667 became effective and Article 513 of Vernon's Annotated Penal Code which provided a definition of obscenity was

also repealed. Substituted in place thereof was the definition contained in Section 43.21 of the new Texas Penal Code.

5. Defendant County Attorney intends to continue to rely upon Articles 4666 and 4667 as amended and the definition of obscene material as now defined in Section 43.21 of the new Texas Penal Code and to pursue his intention to cancel the lease and enjoin as a nuisance the plaintiffs from the further showing of "obscene materials" in said theater unless restrained by this Court.

CONTESTED ISSUES OF FACT

There are no contested issues of fact. The issue is one of Law to determine if the nuisance and obscenity statutes are constitutional or if they may be applied constitutionally to a motion picture theater. Whether the films are or are not obscene is not necessary for a determination of this cause.

CONTESTED ISSUES OF LAW

1. Is the nuisance statute, Article 4666, unconstitutional on its face or can it be constitutionally applied to an enclosed motion picture theater? It is challenged on the following grounds:

A. The nuisance statute operates as a prior restraint in that upon abatement of a nuisance the property is closed for one year from the date of judgment.

B. It is a prior restraint upon matters not already published and not yet found to be obscene.

C. Evidence of general reputation is admissible to prove the existence of a nuisance.

D. It is a deprivation of property without due process by requiring a bond of from one to five thousand dollars conditioned that the prohibited act shall not be

permitted to be done to reopen the property.

E. Violation of the bond could be by contempt putting the burden on the operator to determine any violation of the order and is a denial of due process of law and an unconstitutional prior restraint.

F. Proof of past repeated showing of obscene movies is not proof that another expression or a motion picture is and of itself obscene.

2. Is the nuisance statute, Article 4667, prior to January 1, 1974, unconstitutional on face or as applied to a motion picture theater? The statute is challenged for the following reasons:

A. A motion picture theater is not a bawdy or disorderly house and said statute cannot be constitutionally applied to a theater as a nuisance.

B. The enjoining of a theater as a nuisance is a prior restraint and no motion picture can be suppressed, prohibited or restrained before it is published or exhibited or in any manner communicated.

C. You cannot enjoin the future publication or exhibition of expression.

D. The statute does not provide procedural safeguards necessary to insure due process of law under the First and Fourteenth Amendments as follows:

(1) There is no provision for notice prior to the issuance of the temporary injunction.

(2) There is no provision for a prompt hearing.

(3) There is no provision for a prompt judicial determination.

(4) There is no provision for a prompt appellate review.

(5) The burden of proof is upon the motion picture theater operator.

(6) There is a heavy presumption against constitutional validity and due process requires strict standards describing the standards for a judicial determination of First Amendment rights.

(7) Any injunction against future motion picture films by prohibiting the showing of "obscene" films is too vague and indefinite.

(8) Any injunction against showing films containing certain specified conduct is invalid in that the conduct is not prohibited per se but it still must appeal to the prurient interests, be patently offensive and without any redeeming social value which requires a judicial determination in each case on the merits.

3. Is Article 513 defining disorderly house (Article 4667 defined as a nuisance a disorderly house as defined under Article 513) constitutional or unconstitutional on its face, or as applied to a motion picture theater? It is challenged on the following ground:

A. The definition of obscene is vague and indefinite in that it fails to specifically define by applicable state law as written or authoritatively construed the sexual conduct which is prohibited.

4. Is the nuisance statute, Article 4667, as amended, unconstitutional on its face or as applied to a motion picture theater? It is challenged as follows:

A. For the same reasons as the prior Article 4667.

B. It is unconstitutional on its face because nuisance may not be applied to the exhibition of material presumed protected under the First Amendment.

C. The enjoining of "obscene material" under the statute for its habitual use, threatened or contemplated,

is too vague and indefinite and is a prior restraint. The statute does not permit the injunction against a continued showing of one particular film but requires the closing of the theater for one year as required by the statute because of such use.

D. The statute does not permit an injunction against showing films with certain sexual or obscene conduct. If the nuisance is found, the statute requires the closing of the theater for one year under 4666 as a related statute and is a prior restraint.

5. Is Section 43.21 of Vernon's Texas Penal Code defining obscenity unconstitutional on its face or as applied? It is challenged on the following grounds:

A. The definition of obscenity is too vague and indefinite.

B. The statute as written or as authoritatively construed is unconstitutional because it does not specifically define the sexual conduct prohibited and does not provide fair notice.

C. The statute is overbroad.

APPROVAL RECOMMENDED:

_____ _____

Attorney for Plaintiff Attorney for Defendants

APPROVED this __ day of _____, 1974.

_____

UNITED STATES
DISTRICT JUDGE

APPENDIX
VOLUME II

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 78-1588

* * *

CAROL VANCE, ET AL.,

Appellants

V.

UNIVERSAL AMUSEMENT COMPANY, INC., ET AL.,

Appellees

* * *

Appeal From The United States Court of Appeals For The Fifth Circuit

* * *

NOTICE OF APPEAL FILED JANUARY 15, 1979

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNIVERSAL AMUSEMENT CO., INC., JOE SPIEGEL, JOHN W. COLES, JAMES OHMART, ERNEST GEILLE, JR., BONNIE MOORE, and EDNA BRASHEAR	)	
V.	)	CIVIL ACTION NO. 73-H-528
CAROL VANCE, HERMAN SHORT, CAPTAIN JAMES M. ALBRIGHT, TROY R. DRISKELL, and JUDGE I. D. McMASTER	)	

Before INGRAHAM, Circuit Judge, and SINGLETON and TAYLOR, District Judges.

SINGLETON, District Judge:

I. Introduction

This case comes before this three-judge court in a unique posture. The original case, *Universal Amusements v. Vance*, the captioned case, was brought in the Southern District of Texas, Houston Division, and concerned the impending trial of a motion picture theater operator who had shown the film "Deep Throat." Plaintiffs in that case challenged the constitutionality of article 527 of the Texas Penal Code which at that time constituted the statutory law in Texas on obscenity. The plaintiffs sought, among other remedies, injunctive relief to enjoin the pending criminal prosecution. This three-judge court was constituted as a result of that case.

At approximately the same time as the Houston prosecutions were being instituted and carried out, a motion picture theater operator in Dallas, Texas, was

being prosecuted for also showing "Deep Throat." This prosecution was under the same statute. Chief Judge John R. Brown consolidated these two "Deep Throat" cases.

In May of 1973 a hearing on a preliminary injunction was heard by a three-judge court and denied. The cases were then continued. Over the next two years, many changes in the posture of these cases occurred. The Houston state court prosecution for the showing of the motion picture "Deep Throat" was twice tried. Each time the trial ended in a mistrial because the jury was unable to agree on a verdict. More importantly, however, the prosecution for alleged obscenity-connected activities mushroomed all over the state of Texas. Each time a defendant would seek to have his obscenity prosecution enjoined in a federal court in Texas, Chief Judge John R. Brown would consolidate such case with the instant three-judge case. A full list of all the cases can be found in an appendix to this opinion.

On August 12, 1973 the managing judge of this three-judge court, Honorable John V. Singleton, held a pretrial conference at which attorneys representing all of the parties in each of the cases then consolidated appeared.

The cases, as they were consolidated into the original case, presented a variety of challenges to Texas statutes. Not only was the constitutionality of the substantive obscenity statutes challenged but also the use of statutes allegedly designed for purposes other than the closing down of purported commercial obscenity was challenged, as were the old and new public nuisance statutes used to abate the alleged public nuisance of commercial obscenity. Finally, the law on obscenity had changed. In June of 1973, the Supreme Court de-

cided the Miller quintet.[1] Shortly thereafter, two more important cases in the obscenity field were decided: *Heller v. New York*, 413 U.S. 483, 37 L.Ed.2d 745 (1973) and *Roaden v. Kentucky*, 413 U.S. 496, 37 L.Ed.2d 757 (1973). These cases dealt not with substantive obscenity laws but with the procedures to be used to bring into court those who were alleged purveyors of obscenity. The Texas obscenity laws, too, had changed. On January 1, 1974, the old article 527 was repealed, and in its place section 43.21 et seq. of the new penal code was enacted. The Texas nuisance statutes, also, were changed to specifically provide for the enjoining of the use of a premises for purposes of commercial obscenity.

In an effort to simplify the process of deciding all of these varied cases, the managing judge chose three of the cases which presented the least jurisdictional problems and also presented straightforwardly at least one of the challenges brought on by each of the remaining cases.

On November 15, 1974, the three-judge court again convened to hear oral arguments in each of the three cases. Each of the three sets of parties had earlier submitted a joint Pretrial Order, in which material and important facts had been stipulated and briefs on the points of law involved. Two of the cases have remaining factual disputes, but these are immaterial to the determination of these cases.

II. King Arts Theatre v. McCrea, CA-6-345

The *King Arts* case comes out of San Angelo, Tom Green County, Texas. The plaintiffs are challenging the

[1]The so-called *Miller* quintet consists of five companion cases handed down on June 21, 1973: *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 37 L.Ed.2d 446 (1973); *Kaplan v. California*, 413 U.S. 115, 37 L.Ed.2d 492 (1973); *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 37 L.Ed.2d 500 (1973); and *United States v. Orito*, 413 U.S. 139, 37 L.Ed.2d 513 (1973).

facial constitutionality of article 4667 of Vernon's Annotated Civil Statutes which provides for the abatement of public nuisances and, specifically, the inclusion, as a nuisance, of premises for purposes of commercial obscenity. The facts, as agreed to by the parties are as follows. King Arts Theatre, Inc., was operating an adults-only, enclosed motion picture theater in San Angelo, Texas. The theatre showed sexually explicit films. On October 30, 1973, the landlord from whom the theater building was rented notified King Arts Theatre, Inc., that, at the suggestion of George E. McCrea, the county attorney of San Angelo, he was terminating the lease of the building as of November 15, 1973. The notice further informed the plaintiff that McCrea had contacted the landlord and told him that he intended to bring an application for an injunction to abate the theatre as a public nuisance in order to prohibit the future showing of allegedly pornographic motion pictures.

Plaintiff filed suit on November 12, 1973, requesting a declaratory judgment and injunctive relief. By agreement all parties have determined that the *status quo* will be maintained until the determination of this case.

The county attorney still intends to seek an injunction based on the nuisance statute and to pursue his intention to cancel the lease of the premises.

The initial hurdle which has faced this court since the inception of these suits does not face us in this suit. That is the *Younger v. Harris*, 401 U.S. 37 (1971), hurdle. In the instant case there is no pending criminal or civil prosecution because the county attorney determined that he should wait until the three-judge court had determined the issues before pursuing his intentions. Although the parties could not confer upon the court by agreement jurisdiction where it was lacking, the actions of the county attorney in failing to actively pursue his threatened course of action would

certainly lessen the court's consideration of equity, comity, and federalism upon which *Younger* is based. At the same time, however, the existence of the threat of a real prosecution under the nuisance statute is enough to present an actual controversy as required by Article III of the Constitution. *Steffel v. Thompson*, 415 U.S. 452 (1974). One further question must be answered before we move to the merits of this case. The plaintiff moves for an injunction to prevent the state from utilizing the nuisance statute against it. A traditional prerequisite to injunctive relief, however, has been irreparable injury. This is true whether the injunction seeks to stop the activities of private citizens or the activities of the state, whether criminal or civil. *Steffel v. Thompson, supra*, has suggested that the question of whether or not injunctive relief can be granted in a threatened but not yet pending criminal case brought by the state may depend upon the status of the alleged criminal activity:

> We note that, in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution *for past conduct*, sufficient injury has not been found to warrant injunctive relief, see *Beal v. Missouri P.R. Corp.*, 312 U.S. 45 (1941); *Spielman Motor Sales Co., Inc. v. Dodge*, 295 U.S. 89 (1935); *Fenner v. Boykin*, 271 U.S. 240 (1926). There is some question, however, whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an individual demonstrates that he will be required to *forego* constitutionally protected activity in order to avoid arrest. Compare *Dombrowski v. Pfister*, 380 U.S. 479 (1965); Hygrade Provision Co., Inc. v. Sherman, 266 U.S. 497 (1925); and *Terrace v. Thompson*, 263 U.S. 197, 214, 216 (1923), with *Douglas v. City of Jeannette*, 319 U.S. 157 (1943) . . . .

415 U.S. at 463, n. 12.

In the instant suit the plaintiff is being threatened with the use of a civil statute, although it would be used by the district attorney, and in a real sense the plaintiff would be "prosecuted" by the state.[2] Although it might be termed quasi-criminal in nature, the statute in question does not provide for the incidents of a true criminal statute such as arrest or the posting of a bond. The inconveniences a prosecution of the nuisance statute would bring would not rise to the level of irreparable injury, at least on the facts presented in the instant case. For that reason, the court will confine itself to the question of a declaratory judgment.

The merits of the *King Arts* case present two questions for decision because of the structure of the Texas obscenity laws themselves. As originally threatened by the county attorney of Tom Green County, the nuisance statute, article 4667 of Vernon's Annotated Civil Statutes, provided for the enjoining of "the habitual use, actual, threatened, or contemplated, of any premises, place, or building, or any part . . . [f]or keeping, being interested in, aiding or abetting the keeping of a bawdy or disorderly house as these terms are defined in the Penal Code."

Article 513 of the old Texas Penal Code defined a "disorderly house" in section 2(a) as "any house, building, theater or other structure where obscene motion pictures are displayed, exhibited or shown to persons under twenty-one years of age." Section 2(c) and 2(d) of the statute defined "obscene motion picture" and

[2]It is interesting to note that the Supreme Court has very recently held that a similar Ohio statute was more akin to a criminal prosecution than are most civil cases. *Huffman v. Pursue, Ltd.*, ___U.S.___, 43 L.W. 4379 (March 18, 1975).

"prurient interest" in the *Roth-Memoirs*[3] language virtually identical to that of the old penal code obscenity statute, article 527. The only material difference is that article 513 adds a sentence defining "contemporary community standards." The King Arts Theatre, Inc., was originally threatened with the use of these statutes.

After January 1, 1974, both the nuisance laws and the obscenity laws of Texas were changed. Article 527, "Obscene Articles" and article 513, "Disorderly House" were repealed by the enactment of the new penal code and article 4667 of the Texas Civil Statutes was rewritten. The new article 4667, "Injunctions to abate public nuisances" provides for the enjoining of the "habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof . . . (d) [f]or the commercial manufacturing, commercial distribution, or commercial exhibition of obscene materials . . . ."

Although one is not directed to the definition of obscenity by the statute itself, the logical place to find the state's definition of obscenity would be in the new Penal Code, §43.21, which defines obscenity in virtually the same terms as the old article 527.

The plaintiffs have challenged the nuisance statute because its use necessarily refers one to the Penal Code §27.53 definition of "obscene." This definition is challenged for the reasons that (1) the definition of obscenity is too vague and indefinite; (2) the statute as it is written or as it is construed is unconstitutional because it does not specifically define the sexual conduct prohibited, it does not give fair notice, and it is overbroad.

[3]*Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413, 16 L.Ed.2d 1 (1966), are two Supreme Court cases which set out tests and definitions of obscenity. Their language forms the basis of almost all state statutory law governing obscenity, including both the old and new Texas statutes. Their language has been supplanted by the *Miller* quintet.

In a lengthy and exhaustive opinion, *West v. State of Texas* (No. 45,090), decided October 9, 1974, the Texas Court of Criminal Appeals addressed the question of the constitutionality of the article 527 definition of obscenity. In the *West* case the appellant had been convicted in June of 1971 of exhibiting obscene matter under article 527. The conviction was affirmed in 1972. 489 S.W.2d 597 (Tex. Cr. App. 1972). A writ of certiorari was granted by the United States Supreme Court, the judgment of the Texas Court of Criminal Appeals was vacated, and the case was remanded for further consideration by the Court of Criminal Appeals, in light of the Supreme Court's *Miller* quintet on October 23, 1973. *West v. Texas*, 414 U.S. 961. On February 13, 1974, the Court of Criminal Appeals again affirmed the conviction, but the court granted appellant's motion for leave to file a motion for rehearing. In the opinion denying appellant's motion for rehearing the Court of Criminal Appeals held that although article 527 was perhaps deficient on its face, it had been authoritatively construed by the courts of Texas, and these previous authoritative constructions of the statute supplied any constitutional deficiencies. *West v. state*, 514 S.W.2d 433 (Tex.Crim.App. 1974).

Article 527's definition of obscenity has been reenacted, effective January 1, 1974, in §43.21 of the new Texas Penal Code. The "Practice Commentary" of the Code points out that the language "sex, nudity, or excretion" replaces the old term "sexual matters" in article 527's definition of "obscene." Section 43.21 reads:

> Definitions.
> In this subchapter:
>
> (1) "Obscene" means having as a whole a dominant theme that:
> (A) appeals to a prurient interest in sex, nudity, or excretion;
> (B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and
> (C) is utterly without redeeming social value.
>
> (2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a statute or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment, or machine.
>
> (3) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.
>
> (4) "Distribute" means to transfer possession, whether with or without consideration.
>
> (5) "Commercially distribute" means to transfer possession for valuable consideration.

The *West* opinion deals with a gloss on the "sexual matters" term, but this court believes that the Court of Criminal Appeals would apply that gloss to the substituted terms, "sex, nudity, or excretion."

Both article 527 and section 43.21 have taken their language from the definition found in *Memoirs v. Massachusetts*, 383 U.S. 413, 16 L.Ed.2d 1 (1966), and *Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498 (1957). This definition differs from the new *Miller* definition in two ways. First, under *Miller* the state does not need to prove that the matter is utterly without redeeming

social value. Proof of such a negative was felt by the Supreme Court to be a virtual impossibility and an unnecessary hindrance to the state's prosecutorial functions. In place of the "utterly without redeeming social value" postulate, the Supreme Court substituted the requirement that the state prove the matter lacking in "serious literary, artistic, political, or scientific value."

In the second place, the Supreme Court changed the standard to require the state's obscenity laws clearly and specifically define what is meant by obscene matters:

> We now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state laws, as written or authoritatively construed.

413 U.S. at 24. Further on in the opinion the Court indicates that these specific definitions are to be of "hard core" pornography only. 413 U.S. at 27.

Footnote 6 of the *Miller* opinion, 413 U.S. at 24, clearly indicates that the new *Miller* standard for obscenity is not intended to require the states except Oregon and Hawaii, whose definitions of specific sexual conduct are given as examples by the Court, to enact new obscenity laws. "Other existing state statutes, as construed heretofore or hereafter, may well be adequate."

This court must answer the question of whether or nor the Texas statute can pass the *Miller* test on this issue. Whether referred to as "sexual matters," the term which concerned the Court of Criminal Appeals, or "sex, nudity, or excretion," which concerns this court, the defined sexual conduct the depiction of which is forbidden by the Texas statutes, old or new, is not

sufficiently specific on its face to satisfy *Miller*. However, the construction of the statute by the Court of Criminal Appeals may well save the statute. The court of Criminal Appeals so held in the *West* case.

In the *West* opinion, the Court of Criminal Appeals interpreted and restricted the term "sexual matters" used in the article 527 §1 definition of obscenity to the examples the Supreme Court used in *Miller*:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

413 U.S. at 25.

Further, the Court of Criminal Appeals cited give cases handed down prior to the *Miller* case in which either the Court of Criminal Appeals or the Court of Civil Appeals has construed the statute as forbidding conduct which would fit into the examples which the Supreme Court gave.[4]

The cases show that the court of Texas have adhered rather closely to the ideas of the Supreme Court of what constitutes obscenity. Although it seems to this court that the obscenity laws, even the most specific, are by their natures vague,[5] we cannot hold in light of

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[4]*Phelps v. State*, 396 S.W.2d 396 (Tex. Crim. App. 1965, *Moore v. State*, 470 S.W.2d 391 (Tex.Civ.App.—San Antonio 1971), *Byers v. State*, 475 S.W.2d 935 (Tex. Crim. App. 1972), *Hunt v. State*, 475 S.W.2d 935 (Tex. Crim. App. 1972), and *Thacker v. State*, 490 S.W.2d 854 (Tex. Crim. App. 1973).

[5]*Cf.* discussion in *Roth v. United States*, 345 U.S. 476, 491-492.

the *Miller* quintet's guidelines that the Texas statute, as construed, is impermissibly so.

In *Hamling v. United States*, ___U.S.___, 41 L.Ed.2d 590 (1974), one of the more recent Supreme Court cases on the obscenity subject, the Court faced a challenge to the federal obscenity statute, 18 U.S.C. §1461, which had repeatedly been held not unconstitutionally vague. The statute was again challenged on the grounds that now the statute was unconstitutionally vague because its language did not contain, nor had it been construed to apply, to the specific types of conduct set out in *Miller*. The Court held that that argument "fundamentally misconceives the thrust of our decision in the *Miller* case." The Court reiterated that the purpose of the *Miller* quintet was not to invalidate all existing statutes. "The *Miller* cases . . . were intended neither as legislative drafting handbooks nor as manuals of jury instructions." Since in *United States v. 12 200-foot Reels of Film*, 413 U.S. 123 (1973), one of the *Miller* cases, the Court had clearly indicated that the federal statute would in the future be construed as dealing only with obscenity such as that described in *Miller*, and since it was also clear that the material found obscene in *Hamling* was well within the *Miller* limits, the Supreme Court found that 18 U.S.C. §1461, on its face, as construed, or as applied to appellant Hamling was not void for vagueness.

A related argument in *Hamling* that the statute did not give appellant fair warning of the crime, in light of the new *Miller* standards, failed because the Court pointed out that *Miller* presented a "clarifying gloss" to a statute. It did not make criminal, conduct which was not previously thought to be criminal.

The plaintiff has not presented any other specific challenges to the vagueness and overbreadth of section 43.21 (formerly article 527), although he has challenged the statute generally for this reason. The statute tracks

the language of the *Memoirs-Roth* cases as we have seen, and although *Miller* may have served to clarify that language to a greater extent, *Hamling* makes clear that *Miller* was never intended to invalidate that language completely. Of the two changes which *Miller* made on the *Memoirs-Roth* language, one would render the Texas statute now more stringent than is constitutionally necessary, and the other has now been authoritatively and definitely included in the statutory language through judicial construction by the highest criminal court in the state.

It is clear to this court, therefore, that as it would be incorporated by reference into the nuisance statute scheme, the Texas Penal Code definition of obscenity is not unconstitutionally vague, overbroad, or invalid because it fails to give adequate notice.

The plaintiffs have urged us to hold that the Texas definition as now construed by the Court of Criminal Appeals cannot be used retroactively since the defendants would not have a clear notice of the new construction. The Court of Criminal Appeals rejected that argument in *West v. State*, but the Supreme Court in *Hamling* was not called upon to give a definite ruling since the conduct in *Hamling* so clearly fell within the *Miller* "examples." The posture of the instant case, in which there are no pending cases to say nothing of a criminal conviction, is such that this court, as much as it would prefer to dispose of all issues at one time, believes that it would be highly improper to rule on a point which is not yet ripe for adjudication.

In considering the plaintiff's second challenge to the public nuisance statute, article 4667, we must also consider its companion statutes, articles 4665 and 4666.

Article 4665, "Nuisance; evidence" provides:

> Proof that any of said prohibited acts are frequently committed in any of said places shall be prima facie evidence that the proprietor knowingly permitted the same, and evidence that persons have been convicted of committing any said act in a hotel, boarding house or rooming house, is admissible to show knowledge on the part of the defendants that this law is being violated in the house. The original papers and judgments or certified copies thereof in such cases of convictions may be used in evidence in the suit for injunction and oral evidence is admissible to show that the offense for which said parties were convicted was committed in said house. Evidence of general reputation of said houses shall also be admissible to prove the existence of said nuisance.

Article 4666, "Nuisance; prosecution," was not changed by the legislature when these other statutes were redrawn. It is the only nuisance statute which can be used in the obscenity field because article 527 §1 was repealed with the enactment of the new penal code. The statute provides that upon "reliable information" that a nuisance exists, the attorney general, the district attorney, or the county attorney shall bring suit in the name of the state to abate and enjoin the nuisance. If the state wins, the nuisance is abated and the defendants enjoined from maintaining it. The premises are to be closed for one year unless "the owner, tenant, or lessee" makes bond "in the penal sum of not less than $1,000 nor more than $5,000," with the condition that "the acts prohibited in this law shall not be done or permitted to be done in said house."

The plaintiffs have challenged the use of these Texas nuisance statutes against the operation of allegedly obscene motion picture theaters or bookstores because the statutes present a classic example of a prior re-

straint and because the procedural safeguards are inadequate to protect the dissemination of nonobscene materials which might be caught up with the obscene. Since nonobscene expression is entitled to first amendment protection, the threat which these statutes may present to the first amendment is of serious consideration.

The plaintiffs do not contend that the state cannot enjoin the showing of motion pictures which have been adjudicated obscene. Rather, the argument is that the statute is unconstitutional in providing that once a theater is declared a nuisance, it is to be shut down for one year unless a bond is posted. This prevents the showing of motion pictures that have not been determined obscene.

Although it is now clear that "obscenity is not within the area of constitutionally protected speech or press," *Roth v. United States*, 354 U.S. 476, 485, 1 L.Ed.2d 1498 (1957), it is equally as clear that the censor has the burden of proving that a film is obscene. *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed.2d 649 (1965), *Southern Promotions, Ltd. v. Coward*, ___U.S.___, 43 U.S.L.W. 4365 (March 18, 1975). To prove that a motion picture theater has been the scene of the showing of films that are obscene is not to prove that every film shown in that theater, in the past, present, or future, was, is, or will be obscene. By completely shutting down the operation of a motion picture theater, or by forcing the posting of a bond to keep the theater open, the state has imposed a prior restraint upon the showing of motion pictures. Motion pictures are protected by the free speech and free press guarantees of the first amendment, *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 20 L.Ed.2d 225 (1968), although they are not "necessarily subject to the precise rules governing any other particular method of expression." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 96 L.Ed. 1098,

1106 (1952). That this statute is clearly a prior restraint upon the showing of motion pictures cannot be disputed. *Cf. Near v. Minnesota*, 238 U.S. 697 (1930). ". . . [U]nder the Fourteenth Amendment, a state is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961). Since "[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity," *Bantum Books, Inc. v. Sullivan*, 376 U.S. 58, 70 (1963); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), a statute which would impose such a prior restraint is to be "tolerated . . . only where it operate[s] under judicial superintendence and assure[s] an almost immediate judicial determination of the validity of the restraint." *Bantum Books*, 372 U.S. at 70. The statute in question, by providing for the closing down of the theater or posting bond has not provided for a judicial determination of the obscenity of future motion pictures which may be shown in the theater.

In its defense the state has tried to distinguish the instant case from *Near v. Minnesota, supra*, but the attempt is not successful. In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantum Books v. Sullivan*, 372 U.S. at 66. The separation of these forms of speech calls for "sensitive tools," *Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460 (1958), not the heavy hand of the public nuisance statute.

The state defends the statute by its assertion that the injunction which would abate the nuisance can be

carefully drawn and highly descriptive of the kinds of films which are to be prohibited, citing the Texas Court of Civil Appeals case, *Richards v. State*, 497 S.W.2d 770 (Tex.Civ.App.—Beaumont, 1973), which dealt with an injunction outside the scope of article 4667. In that case the Texas court recognized that the injunction imposed a prior restraint, but upheld it because of "the specificity of the prohibiting order, the course of conduct of the defendants, and the fact that such forbidden future exhibitions would be of hard core pornography." With all respect to the Court of Civil Appeals sitting in Beaumont, this court disagrees with that court's disposition of the case.

In disagreeing with the Court of Civil Appeals, we fall back on the reasoning of *Near v. Minnesota*, 283 U.S. at 713 (1930):

> If we cut through more details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship.

In the instant case if we cut through the details of procedure the substance of the statute is that the public authorities may bring the owner or operator of a motion picture theater before a judge upon a charge of

commercially manufacturing, distributing, or exhibiting obscene materia!. Once the state has proved that he has manufactured, distributed, or exhibited obscene materials, his theater is abated for one year unless he posts a bond of from $1,000 to $5,000. Unless the bond is posted, further showing of any motion picture is punishable by contempt of court. If the bond is posted then motion pictures may be shown, but should at any time the owner or operator step over that fine line between obscenity and nonobscenity, then the bond is forfeited. To this court, that is the essence of censorship.

As dissenting Justice Butler points out in *Near*, the newspapers which the Minnesota statute affected in *Near* were not ordinary newspapers criticizing the actions of public officials. These newspapers were engaged in harsh and malicious diatribes often employing racial epithets and highly improbable statements. Justice Butler was concerned that the "distribution of scandalous matter is detrimental to public morals and to the general welfare." 283 U.S. at 728. His dissent, if paraphrased, could make a logical and telling argument for the defense of the nuisance statute in the instant case. Yet, the majority of the Supreme Court held the first amendment more important.

In *Kingsley Books, Inc. v. Brown*, 354 U.S. 437, 445 (1957), the Supreme Court explained its *Near* decision as striking down the state's attempt to "enjoin the dissemination of future issues of a publication because its past issues had been found offensive." This alone, the Court stated, was enough to condemn the statute, without any reference to the fact that *Near* involved not obscenity, but matters derogatory to public officials, *i.e.*, politics.

In neither the *Near* case nor the instant case does the state seek to condemn that which is wholesome or deserving of protection, yet the flaw of both statutes is

that in preventing the dissemination of the unwholesome it prevents the dissemination of that which is presumed to be legal and protected by the first amendment without a prior judicial determination of illegality.

Times Film Corp. v. Chicago, 365 U.S. 43 (1961) held that prior restraints are not per se unconstitutional, however, and the *Near* case itself left open to the state the possibility of presenting "exceptional circumstances" the showing of which would permit a valid prior restraint of first amendment activities. Among the several examples of situations in which previous restraint of speech may be allowable is: "the primary requirements of decency may be enforced against obscene publications." *Near v. Minnesota*, 283 U.S. at 716.

Near does not suggest, however, that even within these exceptional cases there might not be room for invalid restraints, and *Freedman v. Maryland*, 380 U.S. 51 (1965), made this clear when it set forth guidelines for permissible prior restraints:

> First, the burden of proving that the film is unprotected expression must rest on the censor
>
> . . . .
>
> Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression . . . . [O]nly a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint . . . .

> To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution . . . . [T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 58-59. The language of *Freedman* has been reemphasized in *Southeastern Promotions, Ltd.*, 43 U.S.L.W. at 4370.

Freedman was specifically concerned with the licensing requirement imposed upon film exhibitors. Although the instant case imposes a reverse situation, we have found that it operates, in effect, as a censoring-licensing statute. The *Freedman* language thus gives a great deal of guidance to our decision in the instant case. The key to the *Freedman* case seems to be initial suppression for the shortest fixed period of time until a judicial determination is made and then final suppression *only* after a judicial determination in an adversary context.

By instituting the injunction procedure for a public nuisance, however, the State of Texas is not interested in preserving the *status quo*. The injunction seeks to change the situation by preventing the dissemination of obscenity, but it does not provide for a short fixed time in which a final determination of obscenity can be made.

With this in mind we turn to the procedural framework in which the public nuisance statute operates.

The specific requirements of obtaining an injunction in Texas, which would presumably be utilized in actions pursuant to article 4667, leave much to be desired if they are used in the obscenity context. Rules 680-693(a) of the Texas Rules of Civil Procedure provide the injunction procedures for Texas. Pursuant to those rules, the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunction is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation.

Article 4665 provides that evidence of "general reputation" is also admissible to prove the existence of the nuisance. The rather vague term leaves in constitutional doubt the means by which the prosecution would prove the obscenity alleged. Certainly it leaves open the strong possibility that a constitutional definition of obscenity would not be used. Articles 4666 and 4667 do not even provide by their terms any judicial determination of obscenity prior to the issuance of the injunction. Thus, it is seen that the Texas public nuisance statute does not even begin to fit into the guidelines for permissible prior restraints.

Article 4667(3) of Vernon's Annotated Civil Statutes operates as an invalid prior restraint on the first amendment rights of those who commercially manufacture, distribute, or exhibit materials which may be thought by the state to be obscene but which have not yet been judicially determined to be obscene. For that reason this court hereby declares that article 4667(3) of Vernon's Annotated Civil Statutes is unconstitutional on its face.

III. Richard Dexter v. Ted Butler, SA 740CA-168

The facts of this case are very simple. On four successive occasions—June 24, 1974, June 28, 1974, July 2, 1974, and July 6, 1974—an officer of the San Antonio, Texas, police force entered the Fiesta Theatre, paid the $5 admission charge, and viewed the film "Deep Throat." After viewing the film, he wrote out a report and signed a "Motion for Adversary Hearing" to determine whether or not there was probable cause to seize the film for violating the Texas obscenity laws. The motion was presented to a magistrate who ordered the cause set for a hearing. The plaintiff, who was either merely an employee of the Fiesta Theatre or was its lessee and manager, it matters not to the decision in this case, was notified of the hearing and was advised to call his attorney. Within a half hour to an hour, on each occasion, the hearing was begun. The plaintiff, after consulting with his attorney, waived counsel at the hearing. The hearing was conducted in an unwavering pattern. First, the officer who had viewed the film was called to the stand to testify as to the contents of the film, then the film was viewed by the magistrate. After the viewing of the film, the magistrate issued a search warrant to seize the film and to seize the projector as a "criminal instrument" pursuant to §16.01 of the Texas Penal Code. On the first three occasions, the plaintiff was then arrested, either alone or in company with another theater employee, and charged with "use of a criminal instrument," and "commercial obscenity" in violation of §43.23 of the Texas Penal Code. On the fourth occasion, theater employee Wayne Walker alone was arrested and charged with those offenses. Some $55,000 worth of bonds was set on the plaintiff.

After each seizure the theater obtained another copy of the same motion picture, "Deep Throat," and another projector. The theater continued to operate as

usual, except when the film was seized and it was necessary to secure another film and another projector.

The charge of commercial obscenity, §43.23 Texas Penal Code, is a class B misdemeanor. Section 12.22 of the Texas Penal Code provides for a fine not to exceed $1,000, confinement not to exceed 180 days, or both. The misdemeanor charges were set for trial in County Court No. 3, Bexar County, Texas, and it is the court's understanding that they have been tried. The plaintiff has no quarrel in this court with the charges against him brought pursuant to §43.23. He is challenging, however, the use against him of §16.01—the criminal instruments statute. That statute provides that it is a class 3 felony and §12.34 provides for confinement of not more than ten years nor less than two years and a fine not to exceed $5,000. None of the felony charges of violation of §16.01 on the plaintiff has been presented to the grand jury for indictment, but felony complaints have been filed in each instance and the cases are "pending" in that sense.

The defendants have based their entire defense upon their contention that this court lacks the jurisdiction to hear the merits of the case because of the *Younger v. Harris* doctrine. Defendant has presented no arguments to support the constitutionality of §16.01 or its application.

The *Younger v. Harris* doctrine[6] must give us pause

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[6]In 1971 the Supreme Court of the United States decided six cases on the same day which stand for the general proposition that based on considerations of federalism, equity, and comity, federal courts should refrain from enjoining or in any way interfering with pending state court criminal prosecutions, except in very limited circumstances. *Younger v. Harris*, 401 U.S. 37 (1971), *Samuels v. Mackell*, 401 U.S. 66 (1971), *Boyle v. Landry*, 401 U.S. 77 (1971), *Perez v. Ledesma*, 401 U.S. 92 (1971), *Byrne v. Karalexis*, 401 U.S. 216 (1971), and *Dyson v. Stein*, 401 U.S. 200 (1971).

since charges have been filed against the plaintiffs for violation of §16.01. The criminal cases could be said to be "pending" although the charges have never been presented to the grand jury. What definitely constitutes a pending case has yet to be determined, but even if we unwaveringly held that the cases are "pending," that does not end our discussion. The *Younger* doctrine is not an absolute. Federal intervention, in the proper case, is allowed. The plaintiff asserts that this is the proper case. The defendant maintains that the plaintiff has failed to plead or prove any bad faith harrassment or irreparable injury, the absolute prerequisite for a circumvention of *Younger v. Harris*. Yet, plaintiff has shown that the defendant, in the latter part of June, 1974, instituted a program of repeated seizures of the film, "Deep Throat," and the projector which showed it, charging theater personnel with not only commercial obscenity, but with felony use of a criminal instrument and then failing to present the felony cases to a grand jury. The second seizure of the identical film was not preceded by a judicial determination of the obscenity of the film "Deep Throat." It is obvious that the city of San Antonio was engaged in an "all out" effort to suppress this film. The fourth seizure was the last only because this case was filed in federal court and further seizures were enjoined. In order to fully comprehend the innovative tactics San Antonio put into practice, it is necessary to look at the language of §16.01 of the new Texas Penal Code:

> Unlawful use of Criminal Instrument.
> (a) A person commits an offense if:
> (1) he possesses a criminal instrument with the intent to use it in the commission of an offense, or
> (2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of an offense, he manufactures,

> adapts, sells, installs, or sets up a criminal instrument.
> (b) For purposes of this section, "criminal instrument" means anything that is specially designed, made, or adapted for the commission of an offense.
> (c) An offense under this section is a felony of the third degree.

The words of subpart (b) of the statute clearly indicate that a criminal instrument is not equipment which is designed, made, or adapted for a lawful use, but which incidentally may be used for the commission of a crime. There are many, many common, ordinary, everyday objects which can be used to commit crimes, but these are not criminal instruments. If the clear language of the statute is not sufficient to guide law enforcement officers, the "Practice Commentary" which immediately follows the statute has been provided by the drafters of §16.01. Although the "Practice Commentary" does not have the force of law, it does give us as much information as legislative history because, having been written by authorities in the field, it is intended for the practitioner who utilizes the newly enacted statute to give him a better idea of the statute's meaning. The "Practice Commentary" for section 16.01 says:

> It [the statute] aims at terminating incipient criminal activity, the existence of which is indicated by conduct involving a "criminal instrument." The mere possession or manufacture of things specially designed for the purpose of accomplishing a criminal objective is strong evidence of criminal intent. The instrument must be *specially* designed, made, or adapted for the commission of an offense, however; things frequently used in crime, but which have common, lawful uses, are excluded from the purview of Section 16.01 because possession

> of such things, alone, is conduct too ambiguous for imposition of the criminal sanction . . . .

From this commentary and from the clear language of the statute itself, it can be seen that the statute is not a "use" statute at all. Rather, it is a statute aimed at incipient crime—possession of a criminal instrument, with the specific intent to use the instrument in the commission of a crime. Not only is it not aimed at an instrument which has lawful uses, but it is not aimed at overt criminal actions at all.

Charging the plaintiff with a §16.01 violation with whatever motive the district attorney now would claim cannot have been undertaken with any design to actually convict the plaintiff of the crime. The articles which plaintiff possessed are stipulated to be ordinary 16 millimeter portable film projectors. Such a blatant use of an inappropriate statute, which bootstrapped the misdemeanor offense into a felony was effective in requiring that bail for a felony offense be set, not once but several times. The authorities could not believe, however, that Dexter would ultimately be convicted.

Furthermore, San Antonio has engaged in a program of multiple seizures of the same motion picture without any adjudication of obscenity following the first seizures. In the pretrial order the defendant lists as one of its contentions that *Heller v. New York* "does not proscribe subsequent arrests and seizures for separate and distinct offenses committed by the same person on separate occasions prior to which complete adversary hearings were conducted by a neutral magistrate." It is hard for the court to see how the district attorney of Bexar County could possibly read *Heller v. New York* in this way. The district attorney puts much emphasis on the "adversary hearing" aspect of this case, but we need not unduly concern ourselves with that aspect. The magistrate in *Heller* viewed the film in the theatre,

just as the magistrate in this case. In such a situation an "adversary" hearing is not required t all—the film itself is sufficient to establish "probable obscenity" to subject the film to seizure. The fact that the magistrate notified the attorney and gave him the opportunity to appear at a "hearing"—which consisted of nothing more than the testimony of the police officer and the viewing of the film does not transform San Antonio's procedures into an adversary hearing, the results of which would have the force and effect of a final adjudication of obscenity. We assume that San Antonio is asking us to hold that their procedures are something more than an inquiry into the probable obscenity of the film. This court will not so hold. Bexar County might be commended in other circumstances for its evenhandedness in notifying the defense attorney and allowing him to participate in the proceedings, but its actions would not change the function of the hearing which was to determine "probable obscenity."

Heller held that when the magistrate issuing the warrant actually views the entire film, an adversary hearing prior to the seizure of the film is unnecessary because he has a full opportunity for an independent judicial consideration of probable obscenity. It is implicit in the *Heller* opinion, however, that the decision depended upon the fact that after its seizure:

> [O]f course, the film was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence*. There has been no snowing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself "become a form of censorship," even making the doubtful assumption that no other copies of the film existed. (No emphasis added.)

413 U.S. at 490. Any way one reads this language, one must come to the conclusion that *Heller* implicitly forbids multiple seizures of the type in which Bexar County engaged.

The import of the *Heller* case was recently analyzed in Judge Taylor's recent opinion, *Bradford v. Wade*, 376 F. Supp. 45, 47 (N.D. Tex. 1974):

> [A]t what point can the local authorities seize other copies of the same film that has already been seized? The Supreme Court in *Heller* reaffirmed the proposition that a valid final restraint can only be imposed upon a judicial determination in a full adversary proceeding. The only purpose of seizing a film is for use as evidence. No further copies can be seized until the film is determined to be obscene by a judicial determination on the merits. The Court even said that if the exhibitor does not have another copy of the film, he is to be allowed to copy it for further showing. To not do so would allow the administrative procedure to become a form of prior censorship.

There is no evidentiary reason why this film should have been seized more than one time. When viewed objectively there is no logical reason why this film was seized four times except that the authorities were attempting to harass the theater and its employees and to eliminate the exhibition of this film—prior to any final judicial determination of its obscenity. It is no answer that the authorities were unsuccessful at their chosen task. Resourcefulness in the face of official harassment should not innure to the benefit of the official harassers.

In a companion case to *Younger v. Harris, supra*, *Perez v. Ledesma*, 401 U.S. 82, 27 L.Ed.2d 701 (1971),

the Court expressed the exception to its general holding that long standing equitable and comity principles prevent a federal court from interfering with a pending state court criminal prosecution whether by injunction or by declaratory judgment:

> Only in cases of proven harrassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate.

401 U.S. at 85.

The actions of the Bexar County and San Antonio city officials, in the first place, in conducting multiple seizures of the same film, and in the second place, of charging the plaintiff with violation of a statute which is manifestly inappropriate to the situation, together constitute sufficient bad faith harassment and special circumstances to take the case out of *Younger v. Harris, supra*, and this court finds that plaintiff has proven harassment *and* prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction. The Fifth Circuit said in *Shaw v. Garrison*, 467 F.wd 113 (5th Cir. 1972):

> We hold as the language of *Younger* makes clear, that a showing of bad faith or harassment is equivalent to a showing of irreparable injury for purposes of the comity restraints defined in *Younger*, because there is a federal right to be free from bad faith prosecution. Irreparable injury need not be independently established.

* * *

> The finding of a bad faith prosecution establishes irreparable injury both great and immediate for the purposes of the comity restraints discussed in *Younger*.

467 F.2d at 120.

The most important rationale for the holding in *Younger v. Harris, supra*, is the belief of the Justices that "defense against a single criminal prosecution" in a state court will in most instances be sufficient to protect any defendant's federal constitutional rights. There is a further serious question in this court's mind of whether or not the plaintiff in this case would be afforded the opportunity to defend himself. He is subject to three felony charges but these had not been brought to the grand jury at the time of the hearing before the three-judge court—a space of some five months. When asked about the status of the felony cases, the district attorney asserted that his office was under the impression that the temporary restraining order issued by the managing judge prohibited the presentation to the grand jury. The temporary restraining order read, however:

> [D]efendants . . . be and they are hereby restrained and enjoined from further seizures of versions of the film "Deep Throat" at the Fiesta Theatre, San Antonio, Texas and from arresting the plaintiff, or employees of said theatre, so long as "Deep Throat" is showing at the Fiesta Theatre, San Antonio, Texas . . . .

This temporary restraining order was first issued July 29, 1974, and was successively extended over the continuing protest of the defendant. It was superseded by an order entered September 6, 1974, which enjoined, until the three-judge court could meet and decide, "all proceedings and activities with regard to the Plaintiffs in the consolidated cases." Clearly, however, the order

excluded from its purview "pending state criminal prosecutions" and left the state "free to bring to trial and try any such cases." Neither of those orders entered by the managing judge was intended to, nor does a clear reading of them lead to the conclusion that they, prevent the state from presenting a case to the grand jury.

This court believes that a further reason for the inapplicability of the *Younger* decision in this case is the fact that the state failed to present these charges to the grand jury and through no fault of the plaintiff has prevented him from defending himself in a state court.

The merits of this case are easily disposed of. The statute, §16.01 of the Texas Penal Code, is clearly drawn and very specific. Fault lies not with the legislature in this instance but with the local authorities who brought charges under this law. The statute was obviously designed to deal with a very small class of property which can be used only for the commission of crime and to deal with persons in possession of such property or engaged in the manufacture or adaptation of the property exclusively for use in criminal activities, before the criminal activities are undertaken or completed. By no stretch of the imagination could this statute be used to cover the plaintiff's actions or the possession of an ordinary portable 16 millimeter motion picture projector with removable interchangeable reels.

The court declares that it was applied by the Bexar County and San Antonio city authorities unconstitutionally to the plaintiff motion picture exhibitor. Accordingly, having also found the requisite irreparable harm, the court enjoins the state from prosecuting plaintiff Dexter on the pending felony charges pursuant to §16.01 of the Texas Penal Code, arising from incidents on June 24, June 28, and July 2, 1974, and in

future from prosecuting any motion picture exhibitor for possession or use of equipment which can be used for any lawful purpose.

IV. Ellwest Stereo Theatre, Inc. v. Donald Byrd, et al., CA-3-74-130-E

The plaintiff in this case operates the Ellwest Stereo Theatre in Dallas, Texas. The theater operates what is referred to in slang terms as a "peep show." A number of viewing booths, said to resemble voting booths, each with its own stool and its own projector are provided for patrons who put coins in a coin slot in order to begin the operation of the projector. A short motion picture may then be viewed. On January 24, 1974, a police officer of the city of Dallas entered the theater armed with a search warrant issued by a justice of the peace pursuant to §18.02(2) of the Texas Code of Criminal Procedure. The officer seized three films and three film projectors. With the aid of tools, three coin boxes with their contents were removed. On January 29, 1974, the police officer again entered the premises of the Ellwest Stereo Theatre with a search warrant issued by a justice of the peace and seized two films, two film projectors and two stools. Walls which formed two viewing booths were also removed with the aid of tools.

The parties stipulated that the projectors, coin boxes, booths, and stools seized by the police on January 27 and 29, 1974, belong to the Ellwest Stereo Theatre, Inc., and that Ellwest Stereo Theatre, Inc., has never been prosecuted for a violation of the Texas obscenity laws, articles 43.22, 43.23, or 43.24 of the Texas Penal Code. This is true despite the fact that property seized has been in police custody since its seizure.

Before approaching the merits of the case, we must decide the jurisdictional questions raised by defendant at oral argument. Defendant contends that since apparently plaintiff has abandoned its claim for injunctive relief, this court has no jurisdiction to hear its remaining claim for declaratory relief.

The court has found only one case in which it is stated that there is no jurisdiction in the three-judge court to hear a declaratory judgment action alone. *Long Island Vietnam Moratorium Committee v. Cahn*, 322 F.Supp. 589 (E.D.N.Y. 1970) said in a case in which the plaintiff had represented to the court that no present need for equitable relief existed in view of the fact that the defendant district attorney had agreed to hold off his threatened prosecution until the three-judge court had acted:

> [W]e do not consider the representations of the parties to amount to a withdrawal of a request for injunctive relief, without which, of course, this three-judge court would have no jurisdiction.

322 F. Supp. at 561.

The district court cites two Supreme Court cases, *Swift & Co. v. Wickham*, 382 U.S. 111, 15 L.Ed.2d 194 (1965), and *Fleming v. Nestor*, 363 U.S. 603, 41 L.Ed.2d 1435 (1960). While not inappropriate to the subject matter, these cases are not strong authority for the conclusion reached by the New York court. The *Swift* case concerns the applicability of the three-judge court statute, title 28, section 2281, to a case in which a state statute is challenged on the grounds that it interfered with the supremacy clause of the United States Constitution. Having concluded that the statute was not meant to deal with such questions, the appeal was dismissed for want of jurisdiction. In light of the fact that the declaratory judgment phase of a case is often dealt with by a three-judge court in conjunction with a plea for an injunction, it is not jurisdictionally improper for a three-judge court to hear a declaratory

judgment case. In the *Fleming* case the constitutionality of a federal statute was "drawn into question," in a suit seeking the reversal of the decision of the Secretary of Health, Education and Welfare pursuant to the social security laws. The case decided that when the constitutionality of a statute is drawn into question, but no injunction is sought, a three-judge court is inappropriate.

In the case to which Defendant has cited us, *Triple A Realty, Inc. v. Florida Real Estate Commission*, 468 F.2d 245 (5th Cir. 1972), a single district judge had entered a declaratory judgment that a Florida statute was unconstitutional. The district judge went further to enjoin the state from using this statute. The state appealed on the grounds that a single judge had no authority to issue an injunction and the Fifth Circuit agreed. The court held:

> It is well settled that a three-judge panel is required to enjoin state officers from enforcing a state statute. There are several exceptions, however, and the three-judge statute has long been regarded as a highly technical rule which is to be construed strictly. One well-recognized exception is that actions for declaratory judgments, despite some similarity in result with actions for injunctions, are sufficiently different to fall outside the three-judge requirement. *Mitchell v. Donovan*, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed. 378 (1970); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

The case does not hold, therefore, that it is jurisdictionally impossible for a three-judge court to hear a declaratory judgment. The *Mitchell v. Donovan case* cited by the Fifth Circuit in the quotation above concerns 28 U.S.C. §1253, which provides for direct appeal to the

Supreme Court of cases in which a three-judge court has granted or denied an injunction. The Supreme Court held that the losing party *could not* directly appeal to the Supreme Court a three-judge court's decision which did nothing more than issue a declaratory judgment. The case was not concerned with whether or not a three-judge court *could* issue a declaratory judgment alone or under what circumstances. In *Kennedy v. Mendoza-Martinez*, the plaintiff amended his declaratory judgment complaint to include a prayer for injunctive relief just before the beginning of the third trial in the case. However, the issues were framed for trial to exclude any injunctive relief, and the single district judge who heard the case never mentioned it in his memorandum opinion, findings of fact and conclusions of law, or his judgment. A declaratory judgment only was granted. The Supreme Court concluded that since no injunctive relief was really at issue, there was no reason to convene a three-judge court and the single judge's decision could stand. The Court continued:

> Whether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court we need not now decide, for it is clear that in the present case the congressional policy underlying the statute was not frustrated by trial before a single judge.

372 U.S. at 154.

It would appear to this court that that question is still open and that this court is free to decide the issue, taking into consideration all of the circumstances surrounding the suit. In his original complaint filed February 13, 1974, plaintiff sought both injunctive and declaratory relief. On May 1, 1974, Judge Brown consolidated the case into the already existing block of

cases for purposes of deciding the constitutionality of the obscenity statute. As late as September 4, 1974, when the complaint was amended, plaintiff was still seeking an injunction in addition to declaratory relief. Although the pretrial order does not seek injunctive relief, plaintiff's brief addresses itself fully to the question and all but invites the court to grant injunctive relief. Although plaintiff has not presented the point very precisely, the court cannot say that he has truly abandoned any claim for injunctive relief. Nor can we say that even if he did so abandon his claim at the eleventh hour it would be jurisdictionally inappropriate to hear the case given the circumstances. We therefore hold that plaintiff's claim for a declaratory judgment is properly before this three-judge court and will proceed to the second jurisdictional challenge.

Defendant has alleged that there is no case or controversy here, nor a substantial federal question presented because the plaintiff corporation has not been charged with any crime. The court believes that this fact is irrelevant to the determination of the question of case or controversy. The City of Dallas and the State of Texas have utilized their police powers against the corporation by seizing and retaining its property pursuant to a search warrant issued under article 18.02 of the Texas Code of Criminal Procedure. This presents a case or controversy, *i.e.*, a live grievance. *Goosby v. Osser*, 409 U.S. 512, 35 L.Ed. 36 (1972). Inasmuch as the plaintiff is engaged in the dissemination of motion pictures, presumptively protected by the first amendment to the United States Constitution, and the actions of the state have served to curtail that activity to some extent, the plaintiff has presented to the court a *question* which has substantial first and fourteenth amendment overtones worthy of consideration. Whether or not plaintiff's claim is meritorious, however, remains to be seen.

Younger v. Harris does not appear to be an issue in the instant case. It was not raised in the pretrial Order, in the briefs, or at oral argument. There are no pending criminal prosecutions, at least against the plaintiff here. It has been intimated that there exist criminal prosecutions against individuals arising out of these seizures, but the court is completely unaware of the identity of the individuals involved or of exactly how or een if the property seized was used in prosecutions directed against them. In the recent case *Steffel v. Thompson*, 415 U.S. 452, 471 (1974), the Supreme Court states in footnote 19: "The pending prosecution of petitioner's handbilling companion does not affect petitioner's action for declaratory relief." The footnote continues with a reference to *Roe v. Wade*, 410 U.S. 113 (1973), in which the pending prosecution of a doctor under the Texas abortion laws did not foreclose a declaratory judgment in favor of a pregnant woman against whom no prosecution was pending. Finding no jurisdictional, equitable, comity, or federal bar to the maintenance of this suit, the court will proceed to the merits.

Article 18.02(2) of the Penal Code of Texas as amended effective January 1, 1974, reads:

> [A] search warrant may be issued to search for and seize . . . (2) property specially designed, made, or adapted for or commonly used in the commission of an offense.

Plaintiff has asserted that article 18.02(2) is void on its face and as it applied to plaintiff for three reasons: (1) it places and enforces a prior restraint on material presumptively protected by the first amendment; (2) it is vague and overbroad; and (3) it fails to provide fair notice to persons affected by the statute of the items it proscribes.

As we have pointed out in our discussion of the *King*

Arts Theatre case, the question of what is and what is not a permissible "prior restraint" is an involved one. Calling the use of article 18.02(2) a "de facto prior restraint" is, to this court, a confusion of the issues. In essence, the plaintiff is complaining that under the guise of searching for and seizing as evidence property which "is specially designed, made or adapted for or commonly used in the commission of a crime," the state can, to some extent at least, "shut down" the operations of an adult motion picture business.

The State argues that assuming that the motion pictures shown by the plaintiff corporation were obscene and knowing as we do that Texas has laws to prevent the commercial showing of obscenity, we are left with the indisputable fact that the equipment seized is equipment "commonly used in the commission of a crime."

In order to accept the state's argument, however, we must assume that the motion pictures shown were indeed obscene. This we cannot assume. Motion pictures are protected by the first amendment. Only if they are judicially judged to be *obscene*, using the guidelines set forth by the Supreme Court, do they cease to be protected by the first amendment. While it is true that the showing of a motion picture can be a crime, it is not a crime until it has been judicially determined to be so. This fact takes motion picture obscenity cases out of the realm of crimes such as gambling. A gambler may have a business and he may utilize gambling machines and instruments to carry on his business. The police, using article 18.02(2), may come in with a search warrant and seize all of his equipment, effectively shutting down his business. Such a case would not disturb a court for one reason: the gambler does not have any protections which fall outside the due process requirements of a state's criminal

laws. The adult motion picture proprietor, however, no matter how lewd his neighbors and the police and the district attorney's office may think his business to be, has an added protection—the protection of the first amendment. Until the items which he shows are each proved obscene, he can show anything he wants to show. The police cannot shut down or attempt to shut down his business. *Cf. Marcus v. Property Search Warrants*, 367 U.S. 717, 730-731 (1961).

The state claims, however, that all it was attempting to do was to gather evidence for the trial of obscenity cases and the instruments used in the business were evidence of the crime. Certainly, projection equipment, coin boxes, stools, and portions of booths would not be relevant evidence in the trial of a case alleging commercial exhibition of obscene materials. Proof of the obscenity would seem to rise or fall with the material exhibited, not with equipment used to exhibit the materials. The Dallas city attorney asserted at the oral argument that the booth walls were seized as evidence of pandering. Once again we can only guess at the way in which pandering could be proved by the physical presence of the booth in the courtroom, as distinguished from a photograph of the wall or a lab report of any substances found upon the booth itself. The explanation of the seizure of the booth walls does not explain why or how the projecting equipment, the stools, and the coin boxes are evidentiary and none was offered.

In a case which does not involve the first amendment, this court might accept the "evidence" argument advanced by the City. It is too tenuous, however, when placed in the light of the first amendment. The law enforcement officers entered the theater not once but twice. Each time they seized not only the film shown but also the coin box and projector attached to each booth. Whether intentional or not, and we need not

make such a finding here, their actions served to curtail the operation of the business. It is true that the theater has not been put out of business, but this appears to be the result of the "informal agreement," entered into by the parties before Judge Mahon, not to pursue the matter until this three-judge court had made its decision.

The state cites to us *Heller v. New York, supra*, asking us to hold that motion picture projection equipment is to be held to the same standards as the motion picture itself:

> [I]t appears consistent with the rationale of *Heller* to permit a seizure of projection equipment provided (1) such equipment is seized for a bona fide evidentiary purpose and not to suppress exhibitions of films and (2) seizure of equipment is made under the same procedural limitations applicable to film seizures under *Heller*.

Defendant's Brief, p. 5. The City in this instance has demonstrated an admirable understanding of the *Heller* case but has failed to show this court that there is any bona fide evidentiary purpose for the equipment seized here. Furthermore, all of the stipulated facts point to something far removed from a valid evidentiary search. This was a "raid," accompanied by crowbars and screwdrivers. *Heller* also stands for the proposition that these businesses were not to be shut down but were, on the contrary, to be allowed to continue with a minimum of disruption until obscenity had been proved. The officials in the instant case seem to have sought the maximum amount of disruption of the business.

The fact that the officials in the instant case abused the use of article 18.02(2), however, does not necessarily render that statute facially unconstitutional. The statute is worded to take care of several situations, but it

should be precise enough to guide officials acting in good faith. Examining the entire language of article 18.02 leads one to the conclusion that the words "commonly used in the commission of an offense" are superfluous and ambiguous. It is obvious that article 18.02(2) was written as a companion to section 16.01 of the new penal code which we dealt with above in the *Dexter* case. Section 16.01 refers only to property specially designed, made, or adapted for the commission of an offense, making its possession, manufacture, adaptation, sale, installation, or setting up with knowledge and intent a criminal offense. Article 18.02 provides for a search warrant for "property specially designed, made, adapted for *or* commonly used in the commission of an offense." Section 16.01, Practice Commentary, informs us that the statute was intended to catch the crime before it is committed. It excludes the "commonly used" or similar language because it would be too ambiguous for criminal culpability.

Since obtaining a search warrant deals only indirectly with criminal culpability, one assumes the legislature felt safe in keeping the "commonly used" language in the statute for use in ambiguous or close cases. After all, in the ordinary situation the statute providing for the issuance of a search warrant need not be too specific as long as the search warrant itself is specific. No doubt the legislature failed to foresee that the imprecision of the statute would result in the situation we face here. The language in this situation has become a carte blanche for the authorities who can issue search warrants for items, the possession or manufacture of which cannot, under section 16.01, be crimes, since as we have determined in our treatment of *Dexter v. Butler*, above, section 16.01 is intended for only a very limited and specific class of property. The effect is more than incidental to the motion picture exhibitor who is presumptively protected by the first amendment.

What disturbs this court is the fact that as the statute is worded, there is no bona fide evidentiary purpose which the "commonly used" language could serve. In the first amendment area, even as the state argues, precision is essential. Although in most cases it is assumed that bona fide evidentiary purposes are the basis of searches and seizures, as is evident in this case, seizures in the first amendment area may not be for evidence at all. Article 18.02(2) as it is written is wide open to such abuses. It fails to guide the police officer swearing out the warrant or the magistrate issuing the warrant who later reviews the search and seizure under articles 18.09, 18.12, and 18.13. In the instant case the evidentiary value of the items seized (except the motion pictures themselves) is *de minimis* at best, but the threat to the first amendment rights of the theater owner is very great.

Would the striking out of the "commonly used" language create a gap, however, in the valid enforcement of other criminal laws? The subsections of amended article 18.02 (1) through (9) provide for every possible contingency in which a search warrant could be needed:

> Art. 18.02 Grounds for issuance
>
> A search warrant may be issued to search for and seize:
> (1) property acquired by theft or in any other manner which makes its acquisition a penal offense;
> (2) property specially designed, made, or adapted for or commonly used in the commission of an offense;
> (3) arms and munitions kept or prepared for the purpose of insurrection or riot;
> (4) weapons prohibited by the Penal Code;
> (5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;

> scene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;
> (7) drugs kept, prepared, or manufactured in violation of the laws of this state;
> (8) any property the possession of which is prohibited;
> (9) implements or instruments used in the commission of a crime.

The "commonly used" language of subsection (2) is completely unnecessary not only because there is no corresponding crime for which the property could be used to establish the offense but also because the magistrate does not have to be convinced to a certainty that the property sought is "specially designed, made, or adapted for the commission of an offense," he simply must determine whether or not there is probable cause to believe the property fits the category. When the property is received by the magistrate pursuant to article 18.09, article 18.12, and article 18.13, he can make a better determination.

Accordingly, this court declares that the language of article 18.02(2), "or commonly used in" is unconstitutionally vague and overbroad, is unconstitutional as applied to Ellwest Stereo Theatres, Inc., or any other individual or entity engaged in first amendment activities, in that its use can result in the seizure of equipment and materials which can be used for the exhibition of constitutionally protected items, not for the purpose of obtaining evidence, but for the purpose of shutting down first amendment activities offensive to the authorities before a judicial determination of obscenity.

V. Conclusion

This three-judge court, having ruled on the merits of the three cases, directs counsel for plaintiffs in each of the three cases to prepare a form of judgment in each

of these three cases consistent with this opinion and to do so within thirty (30) days of the date hereof and submit same to counsel for the defendants for approval as to form and then submit same to this three-judge court for approval and entry.

The remainder of the cases, found in the Appendix to this order, will be remanded to the single judge from whom they came. Each judge will hold a hearing on the question of bad-faith harassment or other special circumstances to determine if the case falls outside *Younger v. Harris*, 401 U.S. 37 (1971), or *Huffman v. Pursue, Ltd.*, 43 U.S.L.W. 4379 (March 18, 1975). Should the single judge determine that there is no bad-faith harassment or special circumstances, the cases will be dismissed by that judge in accordance with *Hunt v. Rodriguez*, 462 F.2d 659, *rehearing granted in part*, 468 F.2d 615 (5th Cir. 1972).

Should the single district judge find bad-faith harassment or special circumstances, this three-judge court will receive the cases back and dispose of them in accordance with this opinion.

DONE at Houston, Texas, on this the 3rd day of July, 1975.

_____
United States Circuit Judge

_____
United States District Judge

_____
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
UNITED STATES COURTHOUSE
HOUSTON, TEXAS 77002

CHAMBERS OF
JUDGE JOHN V. SINGLETON, JR.

August 21, 1975

Gentlemen:

RE: C.A. 73-H-528
Universal Amusements Co., et al. v.
Carol Vance, et al.

Page 60 of the opinion filed July 3, 1975, in the captioned case has been revised. The corrected page 60 is attached. Please substitute it for page 60 in the opinion previously sent to you.

Sincerely yours,

John V. Singleton

V. Conclusion

This three-judge court, having ruled on the merits of the three cases, directs counsel for plaintiffs in each of the three cases to prepare a form of judgment in each of these three cases consistent with this opinion and to do so within thirty (30) days of the date hereof and submit same to counsel for the defendants for approval as to form and then submit same to this three-judge court for approval and entry.

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Should the single district judge find bad-faith harassment or special circumstances, this three-judge court will receive the cases back and dispose of them in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNIVERSAL AMUSEMENT CO., INC., JOE SPIEGEL, JOHN W. COLES, JAMES OHMART, ERNEST GEILLE, JR., BONNIE MOORE, and EDNA BRASHEAR	)	
V.	)	CIVIL ACTION NO. 73-H-528
CAROL VANCE, HERMAN SHORT, CAPTAIN JAMES M. ALBRIGHT, TROY R. DRISKELL, and JUDGE I. D. McMASTER	)	

FINAL JUDGMENT

King Arts Theatre v. McRea, CA-6-345

In accordance with this court's memorandum opinion in the above-styled-and-numbered consolidated cases, entered on July 3, 1975, it is hereby ORDERED that the Texas statute designated as article 4667 (a) (3) of Vernon's Annotated Civil Statutes is unconstitutional on its face.

Richard Dexter v. Ted Butler, SA 74-CA-168

Also pursuant to this court's memorandum opinion of July 3, 1975, having concluded that §16.01 of the Texas Penal Code was applied in an unconstitutional manner to the plaintiff, this court ENJOINS the state from prosecuting plaintiff Dexter on the pending felony charges pursuant to §16.01 with regard to incidents occurring on June 24, June 28, and July 2, 1974. The scope of this injunction includes a restraint on any future prosecution of any motion picture exhibitor,

pursuant to §16.01, for possession or use of equipment which can be used for any lawful purpose.

Ellwest Stereo Theatre, Inc. v. Donald Byrd, et al., CA-3-74-130-E

Further, in accord with this court's memorandum opinion of July 3, 1975, it is hereby ORDERED that the language "or commonly used in" in the Texas Statute designated as article 18.02(2) is unconstitutionally vague and overbroad and is unconstitutional as applied to Ellwest Stereo Theatres, Inc., or to any other individual or entity engaged in first amendment activities.

DONE at Houston, Texas, on the 4th day of November, 1975.

Joe Ingraham
Circuit Judge

John V. Singleton
United States District Judge

W. M. Taylor, Jr.
United States District Judge

APPENDIX A

Pre-Trial Hearing

[17]* PROCEEDINGS

THE COURT: Please be seated, Gentlemen. Good morning.

I am not at all sure, quite frankly, that I, as the Court or the Managing Judge, know anything more about this matter than any one of you, probably less.

The reason for bringing you lawyers down here from out of town is that we had a three-judge court case called Universal Amusement versus Carol Vance. It involved Deep Throat. A three-judge court was constituted by Judge Brown, consisting of Judges Ingraham, Taylor and myself.

* * * * * * *

[18] And it involved a claim of unconstitutionality of the Texas Penal Code as it then existed as it related to obscenity, lewdness, et cetera.

About the same time, a case arose out of Dallas and Judge Brown thought he ought to consolidate that case with our [19] case. And since then, Judge Brown—every time any of my fellow judges anyplace in Texas has one of these cases, they ask for a three-judge court and that it be consolidated into our case. And Judge Brown—well, actually, they did not originally ask to be consolidated. That was Judge Brown's idea.

So now we have, according to our records—and as I understand, part of the delay this morning was trying

* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

to find out who all the lawyers were and what happens, our records reflect one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve—thirteen cases including the original case, Judge Brown has consolidated.

I understand from my law clerk now some of you have other cases that we don't know whether they have been consolidated into our case or whether they have not.

But I know of no way to get this show on the road other than for me to do what I have done today and that is have all you lawyers down here in each of the cases that I know anything about, and if there are other cases that you know about that I do not know **[20]** about that have been consolidated, I would like to know about those. I would like for you to stand up and tell me what your case involved. If it is a movie, what movie is involved; if there are pending criminal prosecutions in your case or whether it is a civil matter or a criminal matter; whether or not it involves—as I understand it, some of these may involve books and not movies. And what parts of the penal code are involved in your case and what, basically, the contentions are.

I would like to have you do that and then I would like to have—I want to have Yvette transcribe all this and I would like for all of you—not just because of the money situation, which has nothing to do with it—but I would like for all of you to order copies. And then after I have been able to get this and have it transcribed, send a copy to Judge Taylor and a copy to Judge Ingraham. I can then convene or ask to be convened the three-judge court—or not convened, but ask for a meeting—and we can discuss to see where we are going. I don't know what else to do. We've got to get this show on the road.

* * * * * * *

MR. ZWIENER: Now, when the state amended the

obscenity statute they took the injunctive provisions out of the obscenity statute, and there is an injunctive procedure in the nuisance statutes now which provides that the state can seek an injunction against the movie house that habitually shows obscene films. That is no — these injunction proceedings are no longer in the obscenity statute as such.

THE COURT: They are no longer under 527, but they exist under another statute?

MR. ZWIENER: Yes, sir.

THE COURT: Is that what you are telling me?

MR. ZWIENER: Yes, sir.

THE COURT: And as I understand it, we have some cases here —

MR. ZWIENER: Yes, sir.

THE COURT: — that involve the new statute?

MR. ZWIENER: Yes, sir. Both the new obscenity statute and the new injunction statute.

THE COURT: Okay. Anything else I need to know or that Judge Ingraham or Judge Taylor would need to know about your case so that we could make a decision as to how to proceed?

[39] MR. ZWIENER: Your Honor, there is one general thing, one general observation, that I would like to make with regard to all these cases and the three-judge panel meeting. And I am not sure that my colleagues, the district attorneys and the city attorneys throughout the state, completely endorse what I am going to say and they may want to differ with me, but the Court of Criminal Appeals of Texas, for some years I thought was doing a good job of interpreting the Texas

obscenity statute so as to include within its proscription only hard core pornography, obscenity.

* * *

[41] I take the position that they will return to their old specificity and we will have a statute as interpreted that will comport with Miller v. California. But we will ask that the three-judge court hearing be put off sometime until October. In the cases that I'm in, if there are injunctions against the state proceeding, I have no objection to that.

THE COURT: I don't think you have a thing to worry about there. I don't **[42]** believe there is any way under the sun that we can get any sort of a hearing with this three-judge court before October.

MR. ZWIENER: Thank you, Your Honor.

THE COURT: Hopefully, we can get it this year.

MR. ZWIENER: Thank you, Your Honor. As I say, I'm not sure that my fellow cohorts, the district city attorneys that are here, agree with my remarks, but I would of course prefer to make my argument to the three-judge panel after the Court of Criminal Appeals has hopefully come out with a new and more specific decision.

THE COURT: I don't mind saying that what I have ultimately in my mind, if it is at all practical—and I don't know whether it is practical or not, and I guess we will decide after I hear from all you attorneys—if we could get this case in some sort of a consolidated posture to where we could or you could select one or two attorneys from each side that could represent the whole consolidated case and we could just have a hearing and listen **[43]** everything or almost everything.

THE COURT: But I know the feeling of Judge Ingraham on these three-judge court cases. He doesn't want to have—he wants the managing judge to hold all the factual hearings if the attorneys can't stipulate. He does not—he prefers not to have any hearings, factual hearings, on a three-judge court case.

* * *

[149] THE COURT: All right. How about this Tom Green County case?

MR. GRAVES: Your Honor, please, I think we have the classic case.

THE COURT: That's Judge Woodward's?

MR. GRAVES: Yes, sir. In this case there is no pending criminal prosecution. There is no pending civil prosecution. There was a threat of bringing a nuisance suit, which in the answer was more or less admitted. They had requested the landlord to cancel the lease or, if not, that they would then proceed with a nuisance suit against the King Arts Theatre.

So we have in this case the nuisance statute for determination and the use of the obscenity defnition in the nuisance **[150]** statute, so it raises the issue of whether the obscenity definition is constitutional.

THE COURT: Who represents the defendants in this case?

MR. FLUSCHE: I do, Your Honor, Max Flusche from the Attorney General's office.

THE COURT: The Attorney General's office represents all the defendants in this case, does it not?

MR. FLUSCHE: In King Arts?

THE COURT: Yes, sir.

MR. FLUSCHE: Yes, sir.

THE COURT: Out of Tom Green County?

MR. FLUSCHE: Yes, sir.

THE COURT: Yes.

MR. FLUSCHE: I think Mr. Graves has correctly stated the issues in this case. It's pretty clean cut and it involves the constitutionality of the obscenity statute and the constitutionality of the nuisance statute and the question of whether or not the nuisance statute can utilize the definition of obscenity that is contained in the obscenity statute.

There is no question of bad faith **[151]** harassment here. I believe you state that there was no bad faith harassment—

MR. GRAVES: No.

MR. FLUSCHE: —there is no pending criminal or civil prosecution, and it is—

THE COURT: Why don't we just enjoin everything else and just take this case and just let all the rest of these cases tag along?

MR. GRAVES: Your Honor, I'd be glad—

THE COURT: Just issue some sort of an injunction enjoining any other proceedings in any of the rest of these cases pending the determination of your case? Isn't this the cleanest case we have?

MR. GRAVES: Yes, sir, I think it is. I've looked at all of them. This is the cleanest one, with just threatened prosecution.

MR. KAUFMAN: Respectfully, Your Honor, in reference to old Article 527, I don't believe this case takes that into account unless you would like to throw it in the same **[152]** ball of wax, because we do have some attacks on 527 outstanding in our cases.

MR. GRAVES: It's in there, too.

MR. FLUSCHE: It is, too.

THE COURT: Is the search and seizure under the new—

MR. GRAVES: No, sir. No search and seizure.

MR. FLUSCHE: No search and seizure.

THE COURT: Is the new criminal instrument statute?

MR. GRAVES: No, sir. We will need the search and seizure and the criminal instruments, and the Dexter case is pretty good from San Antonio.

MR. ARANSON: I was going to comment that Mr. Ausburn's case on the criminal instrumentality, 16.01, is almost classic. And then we've got the case involving 18.02, which is that Fort Worth Ellwest case. That is pretty classic.

THE COURT: What you're saying is I could take those three cases, hold all the rest of them in abeyance—

[153] MR. AUSBURN: Right.

THE COURT: —and just proceed on those three cases? Is that what you are saying?

MR. ARANSON: I believe we can, Your Honor, providing we don't have any threshold questions again. As I said before, it would seem that the Mitchum v. Foster approach would preclude that.

THE COURT: You make a very—it's very appealing for me to do something that cuts through some sort of —cuts this down some way, because I get—I think all the judges would just end up getting confused and

chasing more rabbits than we would like to chase in these cases if we do not do something along this line.

I had not thought about it, but I know—I've talked to Judge Woodward over the telephone about his case and I did know that it is his feeling that it represents a rather classic situation, to clear the air on this matter. So if we took—

MR. FLUSCHE: Of course, Your Honor, let me say this, that the factual basis **[154]** for the issuance of an injunction case in King Arts Theatre may not be as compelling as it is or not as strong as it is in other cases.

THE COURT: Well, you all have an agreement up there, do you not, that everything can just stay like it is?

MR. GRAVES: Yes, sir. They filed no injunction proceedings.

THE COURT: As I understand from Judge Woodward everybody just had an agreement that everything would stay like it is and there would be no injunction issued or anything until we could get this matter resolved in this three-judge court.

* * *

[158] THE COURT: Yes. Okay. So as to the King Arts v. McCrea, I could take and get you gentlemen to prepare what we use here in this Court and in Judge Seale's and in Judge Bue's. We have a common pretrial procedure and a pretrial order. I could give you the **[159]** form for that, get you to fill it out. It contains the stipulated facts, and so on and so forth.

We could do that in your case and reach the constitutional problems involved, right?

MR. GRAVES: Yes, sir.

THE COURT: Then you think I ought to take one of those—one of the Dallas cases?

MR. ARANSON: Your Honor, we have that old Section 13 case which we have, you know, the order for injunction on that may deal in some way with this case.

THE COURT: They seem to think that it would.

MR. ZWIENER: Your Honor, the Section 13, which is injunction proceeding, is a new nuisance statute whichis also an injunction proceeding. It has the same constitutional questions, prior restraint, doesn't it?

* * *

[167] THE COURT: Let's just take the King Arts case. Could you gentlemen in the King Arts give us—that is, the three judges—an agreed statement of the case?

MR. GRAVES: I think we could.

MR. FLUSCHE: I believe so, Your Honor.

[168] THE COURT: And a stipulation as to the facts?

MR. GRAVES: Yes, sir.

MR. FLUSCHE: I'm sure we can.

THE COURT: Enumerate the legal issues involved?

MR. GRAVES: Yes.

THE COURT: And the statutes obviously involved?

MR. GRAVES: Yes, sir.

THE COURT: That would be in the enumeration.

File briefs. Anybody in any of the other cases could file an amicus brief.

Okay? Can we proceed that way in your case?

MR. GRAVES: Yes, sir.

MR. ZWIENER: Your Honor, the only thing that occurs to me is they don't have an order to their case, an injunction enjoining future showings, which we do.

THE COURT: Judge Woodward tells me that that's no problem. They have all entered into some sort of agreement that they are going to preserve the status quo.

[169] MR. ZWIENER: What I really referred to is an injunction against the theater from showing obscene materials and whether or not it's carefully drawn. How are you going to solve that problem in your case?

MR. GRAVES: I think the legal issue is prior restraint; can they issue an injunction that says you won't show in the future, quote, obscene film, unquote.

* * *

[198] THE COURT: Could anybody else give me an agreed—write me some sort of a temporary injunction that would be agreed to by everybody?

MR. GRAVES: Your Honor, may I suggest Mr. Flusche or Mr. Zwiener, that they seem to be in all the cases and I've found them very reasonable people, supply reasonable **[199]** answers?

THE COURT: Will you all do that?

MR. COIL: May it please the Court, I'll be happy to join another lawyer to write the order.

THE COURT: Mr. Zwiener, you and Mr. Flusche, can't you all give me some sort of an order?

MR. ZWIENER: Yes, sir, we will, Your Honor, under the condition, of course, that I may turn around and address my fellows here and say that I'm doing it under the instructions of the Court.

THE COURT: Okay. You are.

* * *

[200] MR. ZWIENER: I am familiar with the case. Leave that out. Of course, this Austin Book Store case, we are under an injunction, too, I believe, Your Honor.

THE COURT: Right. But as I understand—now, that case, you all sort of agreed to it, haven't you? Can't you operate under an agreed order?

MR. ZWIENER: Yes, sir.

APPENDIX B

No. 78-2055-C

Henry Wade, District Attorney of Dallas County, Texas and Lee E. Holt, City Attorney of the City of Dallas, Texas,
Plaintiffs,
vs.
Richard Joseph Haddad, Charles E. Carlock, Thomas Lynn Edmiston, Marlin Babb and Mateo Espindola,
Defendants.

In the District Court
Dallas County, Texas
68th Judicial District

Order Granting Temporary Injunction

On April 6 and 7, and on June 29 and 30th, 1978 the Court considered the application of Plaintiffs Henry Wade, District Attorney of Dallas County, and Lee E. Holt, City Attorney of the City of Dallas, for a temporary injunction pursuant to article 4667, Tex.Rev.Civ. Stat.Ann., after due notice to Defendants Charles E. Carlock and Thomas Lynn Edmiston, as ordered by the Court, and the Plaintiffs and Defendants Charles E. Carlock and Thomas Lynn Edmiston having appeared by and through their attorneys of record, and the Court having heard the evidence finds that Defendants Charles E. Carlock and Thomas Lynn Edmiston have engaged in the habitual use of, and have been parties to the use of, the premises or building or a part of a building located at 11128 Harry Hines Boulevard, Dallas, Dallas County, Texas, being further described as lot 10, block C/6521, in the City of Dallas, Dallas County, Texas, and being further described as:

> That certain lot, trace or parcel of land, lying and being situated in the County of Dallas, State of Texas, more fully described as follows, to-wit:

> BEING a tract of land out of the WM. MOONEYHAN SURVEY, ABSTRACT NO. 946, and more particularly described by metes and bounds as follows:
>
> BEGINNING on the Northeast line of U. S. HIGHWAY NO. 77, 313.4 feet Southeast of the intersection of the Northeast line of U. S. HIGHWAY NO. 77, with the North line of a 22¾ acre tract;
>
> * * * * * * *
>
> THENCE in a Northwesterly direction, parallel to the East line of U. S. HIGHWAY NO. 77, 50 feet to a point for corner;
>
> THENCE in a Westerly direction, 135 feet to the PLACE OF BEGINNING, and being also known as a part of LOT 10 in BLOCK "C," according to an unrecorded Map of JACK LIVELY'S SUBDIVISION in said Survey,

for the commercial exhibition of obscene material on December 5, 1977, December 22, 1977, January 5, 1978, January 6, 1978, January 17, 1978 and January 18, 1978 by commercially exhibiting at that location certain motion picture films, each of which has as a whole a dominant theme that appeals to an interest of the average person in human sexual conduct that goes substantially beyond customary limits of candor in description of representation of such conduct, applying contemporary community standards; which films depict in a patently offensive way contact between the genitals of one person and the mouth or anus of another person, and contact between a human female sex organ and a human male sex organ, and patently offensive representations of human masturbation; and which films lack serious literary, artistic, political or scientific value.

The Court, having so found, and having considered the authorities and arguments of counsel, concludes that the habitual use of the hereinabove described premises for the commercial exhibition of obscene material constitutes a nuisance and that Plaintiffs are entitled to the temporary injunction prayed for.

It is therefore ordered that the temporary injunction or be, and it is hereby, granted against Defendants Charles E. Carlock and Thomas Lynn Edmiston, their agents, employees and all persons acting in concert with them, and that the Clerk of this Court issue a writ of injunction, pending final hearing and determination of this cause, restraining and enjoining Defendants Charles E. Carlock and Thomas Lynn Edmiston, their agents, employees and all persons acting in concert with them, from commercially exhibiting within the premises or building or any part of a building located at 11128 Harry Hines Boulevard, Dallas, Dallas County, Texas, being further described as lot 10, block C/6521 in the City of Dallas, Dallas County, Texas, and being further described as:

> That certain lot, tract or parcel of land, lying and being situated in the County of Dallas, State of Texas, more fully described as follows, to-wit:
>
> BEING a tract of land out of the WM. MOONEYHAN SURVEY, ABSTRACT NO. 946, and more particularly described by metes and bounds as follows:

and:

* * * * * * *

> All that certain lot, tract or parcel of land situated in Dallas County, Texas, to-wit:
>
> BEING a tract of and 50 feet by 135 feet, a part

> of the WM. MOONEYHAN SURVEY, ABSTRACT NO. 946 and more particularly described by metes and bounds as follows:
>
> BEGINNING on the Northeast Line of U.S. HIGHWAY NO. 77, 263.4 feet Southeast of the intersection of the Northeast Line of U.S. HIGHWAY NO. 77, with the North line of a 22¾ acre tract;
>
> THENCE Southeast, along the East line of U.S. HIGHWAY NO. 77, 50 feet to a point for corner;
>
> THENCE in a Northeasterly direction, 135 feet to a point for corner;
>
> THENCE in a Northwesterly direction, parallel to the East line of U.S. HIGHWAY NO. 77, 50 feet to a point for corner;
>
> THENCE in a Westerly direction, 135 feet to the PLACE OF BEGINNING, and being also known as a part of LOT 10 in BLOCK "C," according to an unrecorded Map of JACK LIVELY'S SUBDIVISION in said Survey,

any motion picture which has as a whole a dominant theme that appeals to an interest of the average person in human sexual conduct that goes substantially beyond customary limits of candor and description or representation of such conduct, applying contemporary community standards; which film depicts or describes in a patently offensive way contact between any part of the genitals of one person and the mouth or anus of another person, or contact between a human female sex organ and a human male sex organ, or contact between a person's mouth or genitals and the anus or genitals of an animal or fowl, or patently offensive representations of human masturbation or human excretory functions; and which film lacks serious literary, artistic, political or scientific value.

Dated: June 30, 1978.

/s/ OWEN GILES
Judge, Presiding

0957B/jn

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 75-4313

UNIVERSAL AMUSEMENT COMPANY, INC., ET AL.
versus
CAROL VANCE, ET AL.

****

RICHARD C. DEXTER, Plaintiff-Appellee,
versus
TED BUTLER, District Attorney of Bexar County, Texas, ET AL., Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

Before

BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.*

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court en banc that it adopts as its opinion herein so much of the panel opinion as commences at 559 F.2d 1286 following the sub-heading "II. DEXTER v. BUTLER." The Court en banc supplements the portion of that opinion concerning attorneys' fees by reference to Part IV of their en banc opinion in the King Arts Theatre case, No. 75-4312, handed down today, December 18, 1978; the judgment of the said District Court in this cause is, affirmed,

and that this cause be, and the same be hereby remanded to the said District Court in accordance with the opinion of this Court en banc;

It is further ordered that the defendants-appellees pay to the plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 18, 1978

ISSUED AS MANDATE: JUN 18 1979

*Judge Morgan was a member of the en banc court under 28 USCA 46(c) and participated in the oral argument of the case en banc. Subsequently, the Omnibus Judgeship Bill, Public Law 95-486 (95th. Congress) was approved October 20, 1978. In view of this, Judge Morgan does not participate in this decision.

Supreme Court, U. S.
FILED
MAY 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1588

CAROL VANCE, et al.,
Appellants,

vs.

UNIVERSAL AMUSEMENT CO., INC., et al.,
Appellees.

GEORGE E. McCREA, et al.,
Appellants,

vs.

KING ARTS THEATRE, INC.,
Appellee.

MOTION TO AFFIRM OR DISMISS

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Pursuant to Paragraph 1(c) of Rule 16 of the Revised Rules of this Court, Appellee moves that the judgment of the Court of Appeals be affirmed on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument. Appellee further moves pursuant to Paragraph 1(a) of Rule 16 that the appeal be dismissed on the ground that it was not taken in conformity to these rules. Appellees specifically state that the Appellants do not set forth in their jurisdictional statement the questions presented by the appeal as required by Rule 15.

OPINIONS BELOW

This cause was originally heard by a three-judge district court reported at 404 F.Supp. 33. The State of Texas on behalf of the Appellants appealed to The United States Court of Appeals for the Fifth Circuit which rendered an opinion reported at 559 F.2d 1286. A Petition for Rehearing En Banc was filed. The Court granted the rehearing en banc and rendered its opinion on December 18, 1978, which is reported at 587 F.2d 159.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdictional statement of Appellants does not state the jurisdictional grounds. Notice of appeal, however, was filed indicating that Appellants rely upon 28 U.S.C. § 1254(2).

PRELIMINARY STATEMENT

The Appellant's preliminary statement is not entirely correct. The opinion in the district court indicates that a number of cases (approximately 17) were consolidated in that each challenged similar Texas statutes involving obscenity proceedings or the use of nuisance proceedings in an obscenity situation. As stated in the District Court opinion, the managing Judge, in an effort to simplify the process of deciding all of the varied cases, chose three of the cases which presented the least jurisdictional problems and also presented straightforwardly at least one of the challenges brought on by each of the remaining cases. The three cases were tried upon a stipulation of facts set forth in pre-trial orders which also specified the issues. Two of the three cases decided by the District Court were

appealed, which were this cause by the State of Texas and *Butler v. Dexter,* by the District Attorney's office of Bexar County and the City of San Antonio. The appeal of the *Butler* case did not involve Article 4667(a)(3) as stated in the jurisdictional statement, but involved bad faith of the City of San Antonio and the District Attorney's office of Bexar County in the use of a criminal instrument statute found in § 16.01 of the Texas Penal Code to charge that motion picture operators using an ordinary movie projector and showing films with a felony of using a criminal instrument. The felony charge was used in bad faith even though the showing of an obscene movie was a Class B misdemeanor in Texas.

QUESTIONS PRESENTED

The Appellants set forth no questions presented by their appeal. The Appellants, however, attempt to discuss three reasons why their appeal is substantial and the questions may be constructed from their discussion.

Appellee, however, not only believes that the questions are insubstantial but that Appellants do not comply with Rule 15 in setting forth the questions presented by the Appeal which might be considered by the Court.

The following appear to be the questions which are insubstantial.

1. Was the Court of Appeals correct in finding that the Texas statutes lacked procedural safeguards for issuance of an injunction prohibiting exhibition of obscene material past and future?

2. Was the Court of Appeals correct in holding Article 4667 (a)(3) of the Texas statutes unconstitutional insofar as it authorizes injunctions against future exhibition of unnamed motion picture films?

3. Was the Court of Appeals in error in holding that the Appellee as a prevailing party is entitled to attorney's fee under the Attorney's Fee Award Act of 1976, which amended 42 U.S.C. §1988 to permit awards of attorney fees for suits brought under the Civil Rights Acts?

STATEMENT OF THE CASE

King Arts Theater, Inc. was operating a motion picture theater in San Angelo, Texas. The Appellant, George E. McCrea, County Attorney, contacted the landlord to request the lease be cancelled and to advise the landlord that an injunction suit charging the theater was a nuisance would be filed under the appropriate Texas statutes. The County Attorney intended for the injunction to abate the theater as a public nuisance in order to prohibit the future showing of allegedly obscene motion pictures. The Appellee, King Arts Theater, filed suit requesting a declaratory judgment and injunctive relief. By agreement, the parties determined the status quo would be maintained until determination of the cause.

At the pre-trial hearing in August, 1974, the King Arts Theater case was selected as a classic case clearly setting forth issues that were raised not only by it but other consolidated cases. That portion of the pre-trial hearing indicating the process of selection, the cooperation of the attorney for the State of Texas and the agreement of the parties are set forth in Appendix A.

Mr. Zwiener and Mr. Flusche from the office of the Attorney General of the State of Texas represented the appellants. Mr. Zwiener also represented the State of Texas in a number of the other cases then before the Court in the pre-trial hearing. The Attorney General's office cooperated with the Court in the selection of three cases which set forth the several statutes being attacked in the various cases and drafted a general injunctive order concerning some of the other cases. The Court had originally requested the hearing in order to attempt to learn all of the issues and to decide what, if any, hearings were necessary to determine facts by single judge prior to the convening of the three judge court. It developed during the course of the proceeding that the managing judge selected three of the cases which presented the straightforward issues and all counsel cooperated in stipulating facts and issues. While the Court restrained future harassment and arrest, the District Court did not restrain the trial of any criminal actions pending.

The stipulations and pre-trial orders were entered, briefs prepared and the three judge District Court rendered its decision.

The decision by the District Court involving *Ellwest Stereo Theater, Inc. v. Byrd* from Dallas was not appealed by officials in Dallas or the State Attorney General's office. The Court declared a portion of the Texas statute on search warrants unconstitutional and held that its use in the seizure of equipment and materials such as motion picture projectors and other equipment was improper and ordered such material returned.

The City of San Antonio and the District Attorney's Office of Bexar County appealed the *Dexter* case, but no other party, including the State of Texas joined in.

The State of Texas appealed the provision involving nuisance but no one representing parties in the other cases intervened or attempted to intervene in the appeals to the United States Court of Appeals for the Fifth Circuit.

The pre-trial hearing, as shown in Appendix A, clearly shows that the Court was attempting to litigate in a clear, straightforward matter the issues presented by the number of these cases which had been consolidated. The State of Texas cooperated

in this effort and did not object. In fact, the state indicated the King Arts case clearly involved the constitutionality of the nuisance statute.

The Court of Appeals for the Fifth Circuit sitting en banc determined that the only issue on appeal was the constitutionality of the Texas nuisance statutes as applied to obscenity. The Court determined that Article 4666, which permitted a one-year closing remedy of a nuisance was inapplicable to obscenity. The State of Texas did not appeal this issue to The United States Supreme Court.

The Court of Appeals further determined that article 4667 (a)(3) was unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films. Such a broad injunction could not stand and amounted to a prior restraint. The Court of Appeals further found that the Texas nuisance statute authorizing an injunction against commercial exhibition of obscene material lacked procedural safeguards. Finally, the Court of Appeals found that King Arts Theater was a prevailing party and remanded the cause to the District Judge to award fees to the attorney for King Arts pursuant to the Civil Rights Attorney's Fees Award Act of 1976.

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE TEXAS STATUTES LACKED PROCEDURAL SAFEGUARDS FOR ISSUANCE OF INJUNCTIONS AGAINST COMMERCIAL OBSCENITY AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

The Court of Appeals found the following:

1. The Texas injunction procedures treat obscenity no different than any other civil action.

2. A temporary restraining order without notice and ex parte may be issued under the Texas Rules of Civil Procdure.

3. A preliminary injunction may be issued upon probable right which cannot be reversed on appeal unless there is an abuse of discretion. The Texas procedures are from the federal rules for obtaining injunctions.

4. Once a temporary injunction is issued there is no procedure for obtaining any prompt hearing upon the merits.

5. There is no provision for a prompt decision after a hearing on the merits is finally reached.

The Court of Appeals found that the Texas statutes did not conform with the requirements set forth by decisions of this Court including the model for such injunction procedures set forth in *Kingsley Brooks v. Brown*, 354 U.S. 436.

The appellee contends that the Court of Appeals is imminently correct that neither Article 4667 nor the Texas Rules of Civil Procedure provide procedural safeguards necessary to insure due process of law when dealing with materials presumptively protected by the First Amendment. Appellee agrees with the reasons set forth by the Court of Appeals that the Texas statutes have no procedural safeguards for the following reasons:

1. There is no provision for notice prior to the issuance of a temporary injunction.

2. After the issuance of a temporary injunction, there is no provision for a prompt hearing.

3. There is no provision for a prompt judicial determination after the hearing on the merits.

This Court has discussed this proposition and the Court of Appeals for the Fifth Circuit properly applied the reasons set forth by this Court in *Freedman v. Maryland*, 380 U.S. 51;

Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423; and *U.S. v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400.

In *Blount v. Rizzi, supra*, this Court determined there was a need for a provision for a prompt hearing and a prompt judicial determination. A statute detaining mail was held unconstitutional. This Court held the procedures in the federal statute violated the First Amendment unless they included *built-in safeguards*. The Court declined to interpret the statute and refused to rewrite the act of Congress. On the other hand, this Court determined from the legislative history that it could construe the statute in *U.S. v. Thirty-Seven Photographs, supra* and authoritatively determined the time limit for beginning proceedings and for the hearing and determination. This Court explained that it could not construe the state statutes in *Freedman v. Maryland, supra*, or *Teitel Film Corporation v. Cusack*, 390 U.S. 139 because there were *state statutes* and the Court lacked jurisdiction authoritatively to construe state legislation. This Court has also pointed out many times that the procedures considered in *Kingsley Books, Inc. v. Brown, supra*, provide a model for the injunctive procedure. The New York statute provided a hearing one day after joinder of issue and a decision by the judge within two days after termination of the hearing. There was no injunctive relief until there had been a judicial determination of obscenity following notice and an adversary hearing.

The appellants in this cause cite no authority and raise no substantial question. Neither Article 4667(a)(3) nor the Texas Rules of Civil Procedure have any procedural safeguards built in nor do any of the cases cited by the appellants indicate any construction by the highest court of Texas writing in procedural safeguards for a prompt hearing and a prompt decision or for a proper notice and adversary hearing prior to the issuance of the temporary injunction. There is no substantial federal question raised concerning procedural safeguards for this Court to consider.

The appellants attempt to state that all of the courts of Texas will issue carefully worded injunctions which will have procedural safeguards built in. There is still no assurance that any Texas state court will require notice and adversary hearing or change any procedural rules nor provide for a prompt judicial hearing.

In addition, the State of Texas cannot assure that injunctions will be granted that will properly enjoin future unnamed allegedly obscene films and such an injunction is a prior restraint. An example of such an injunction issued by a state court in Dallas while this case was pending on appeal with the Fifth Circuit which violating the assurances of the State of Texas set forth in the Jurisdictional Statement is attached as Appendix "B" to this brief.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION AND THE COURT OF APPEALS WAS CORRECT IN HOLDING TEXAS STATUTE ARTICLE 4667(a) (3) UNCONSTITUTIONAL INSOFAR AS IT AUTHORIZES INJUNCTIONS AGAINST FUTURE EXHIBITION OF UNNAMED FILMS

The Court of Appeals found that the Texas decisions allow issuance of an injunction against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute. The court found that such an injunction cannot stand for it amounts to a prior restraint on materials not yet declared obscene. The court found that a film containing many of the acts listed in the statute may eventually be held not to be obscene since the work must be taken as a whole and since state law cannot define the contemporary community standards that must be applied by the fact finder. *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756. In addition the Court of Appeals found that an injunction forbidding

the showing of any film portraying particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. The court further found that such an injunction by interweaving language from the obscenity statute merely begs the question by making an advance judicial determination that any film containing such acts must be obscene. The State of Texas in the jurisdictional statement attempts to state that such an injunction as was issued in Austin, Texas and set forth in the appendix to its brief meets any constitutional objections. The injunction issued in Dallas attached as Exhibit "B" to this brief, long after the Austin injunction, clearly shows the inconsistent applications in the State of Texas by its lower courts. The State of Texas attempts to rely upon *Richards v. State*, 497 S.W.2d 77, which said that if its action in attempting to say that films which portray explicit sexual manners are automatically obscene and could be so identified in an injunction against future films was not correct that the court was an *intermediate* court and it would conform to that of overriding authority when required to do so.

The decision of the Court of Appeals is correct and follows the holding of many decisions finding an injunction against future unnamed films is a prior restraint. See *Parish of Jefferson v. Bayou Landing, Ltd.*, 350 S.2d 158 (La. 1977); *News Mart, Inc. v. State ex rel. Webster*, 561 S.W.2d 752 (Tenn. 1978); *Ranck v. Bonal Enterprises, Inc.*, 467 Pa. 569, 359 A.2d 748 (Pa. 1976); *Fehlhaber v. North Carolina*, 445 F. Supp. 130 (E.D. N.C. 1978); *Busch v. Projection Room Theatre*, 550 P.2d 600, *cert. denied*, 429 U.S. 922; *General Corp. v. State ex rel. Sweeton*, 320 S.2d 668 (Ala. 1975), *cert. denied*, 425 U.S. 904.

There is no conflict between this decision and decisions cited by the State of Texas such as *Near v. Minnesota*, 283 U.S. 697 (1931); *Kingsley Books v. Brown*, 354 U.S. 436 (1957), or

Southeast Promotions, Ltd. v. Conrad, 420 U.S. 546. In fact, the decision by the Court of Appeals is consistent with those decisions by this Court which would require procedural safeguards. It would be an easy way for this Court to control obscenity if a court could merely state you may not show sexual intercourse in a film. It would be equally invalid to provide in the injunction that you may not show sexual intercourse in a film provided that such conduct appeals to prurient interests and is without any serious value.

Such an injunction against future unnamed films is overbroad and a prior restraint. The decision of the Court of Appeals is correct and further does not present any substantial federal question for this Court to consider.

THE AWARD OF ATTORNEY'S FEES RAISES NO SUBSTANTIAL QUESTION

The Appellants in their jurisdictional statement, makes an unwarranted conclusion that the awarding of attorney's fees raises substantial questions of fact and law and refers to the fact that a number of cases were consolidated.

The State of Texas was a defendant in this cause and represented defendants in a number of cases. It is completely illogical for the State to imply that the County Attorney would have attorney's fees levied against him for a multitude of cases. King Arts Theatre is entitled to fees for its attorney for issues raised by this case to be awarded against either the State of Texas or the County. The District Court judge may and probably will levy fees against the State of Texas. The State of Texas appealed and represented the parties and wanted the issues litigated. As shown by the Appendix setting forth the pre-trial hearing, the State of Texas was interested in many cases. No parties in this cause were forced into areas of litigation not originally contemplated. This original suit for declaratory judgment raised the

issue of the use of a nuisance statute to enjoin future unnamed films and that procedural safeguards are lacking. This is exactly the finding of the Court of Appeals in this decision.

This Court has determined that attorney's fees may be awarded to the prevailing party under the Civil Rights Attorney's Fees Awards Act of 1976, codified in 42 U.S.C. §1988. The Court in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, specifically held that fees may be awarded to the prevailing party even against the state. The Court made clear that the legislative history of the act provides that attorney's fees may be obtained either directly from the official in his official capacity, from funds of his agency or under his control or from the state or local government whether or not the agency or government is a named party. In this cause, not only the County Attorney, but the Attorney General of the State of Texas and the Governor of the State of Texas were likewise made parties. The Attorney General defended the constitutionality of the acts of the State of Texas. The Court this term in *Quern v. Jordan*, — U.S. —, 99 S.Ct. 1139, stated that it was held in *Hutto v. Finney* that in enacting the Civil Rights Attorney's Fees Award Act of 1976, Congress intended to override the Eleventh Amendment immunity of the states and authorize fee award payments by the states when their officials are sued in their official capacity.

It is inconceivable to say there is a substantial question arising as to the determination of the award of fees to counsel for King Arts Theatre, Inc. against the State of Texas or the County Attorney, because there were other pending cases which were not thereafter tried, nor could there be any claim for attorney's fees in this cause for other cases. All of those cases were remanded back to the single judge court and so far as is known, none were appealed (see 404 F.Supp. at 47). Each of these cases would stand on its own merits for any attorney's fee award.

The District Court and the Court of Appeals, by litigating this one case saved substantial time and effort on the part of

the State of Texas in defending a number of cases. There is no Federal question, and certainly no substantial question that this Court should consider which would reverse the holding that the attorneys for King Arts Theatre are entitled to an award of attorney's fees as the prevailing party.

CONCLUSION

For the foregoing reasons, we respectfully submit that the questions presented by appellants are clearly insubstantial and the judgment of the Court of Appeals should be affirmed.

FRIERSON M. GRAVES, JR.,
Attorney for Appellee

APPENDIX.

APPENDIX A

Pre-Trial Hearing

[17]* PROCEEDINGS

THE COURT: Please be seated, Gentlemen. Good morning.

I am not at all sure, quite frankly, that I, as the Court or the Managing Judge, know anything more about this matter than any one of you, probably less.

The reason for bringing you lawyers down here from out of town is that we had a three-judge court case called Universal Amusement versus Carol Vance. It involved Deep Throat. A three-judge court was constituted by Judge Brown, consisting of Judges Ingraham, Taylor and myself.

* * * * * * *

[18] And it involved a claim of unconstitutionality of the Texas Penal Code as it then existed as it related to obscenity, lewdness, et cetera.

About the same time, a case arose out of Dallas and Judge Brown thought he ought to consolidate that case with our [19] case. And since then, Judge Brown—every time any of my fellow judges anyplace in Texas has one of these cases, they ask for a three-judge court and that it be consolidated into our case. And Judge Brown—well, actually, they did not originally ask to be consolidated. That was Judge Brown's idea.

So now we have, according to our records—and as I understand, part of the delay this morning was trying to find out who all the lawyers were and what happens, our records reflect one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve —thirteen cases including the original case, Judge Brown has consolidated.

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

I understand from my law clerk now some of you have other cases that we don't know whether they have been consolidated into our case or whether they have not.

But I know of no way to get this show on the road other than for me to do what I have done today and that is have all you lawyers down here in each of the cases that I know anything about, and if there are other cases that you know about that I do not know **[20]** about that have been consolidated, I would like to know about those. I would like for you to stand up and tell me what your case involves. If it is a movie, what movie is involved; if there are pending criminal prosecutions in your case or whether it is a civil matter or a criminal matter; whether or not it involves—as I understand it, some of these may involve books and not movies. And what parts of the penal code are involved in your case and what, basically, the contentions are.

I would like to have you do that and then I would like to have —I want to have Yvette transcribe all this and I would like for all of you—not just because of the money situation, which has nothing to do with it—but I would like for all of you to order copies. And then after I have been able to get this and have it transcribed, send a copy to Judge Taylor and a copy to Judge Ingraham. I can then convene or ask to be convened the three-judge court—or not convened, but ask for a meeting—and we can discuss to see where we are going. I don't know what else to do. We've got to get this show on the road.

* * * * * * * *

[39] MR. ZWIENER: Your Honor, there is one general thing, one general observation, that I would like to make with regard to all these cases and the three-judge panel meeting. And I am not sure that my colleagues, the district attorneys and the city attorneys throughout the state, completely endorse what I am going to say and they may want to differ with me, but the Court of Criminal Appeals of Texas, for some years I thought was doing a good job of interpreting the Texas obscenity statute so

as to include within its proscription only hard core pornography, obscenity.

* * *

[41] I take the position that they will return to their old specificity and we will have a statute as interpreted that will comport with Miller v. California. But we will ask that the three-judge court hearing be put off sometime until October. In the cases that I'm in, if there are injunctions against the state proceeding, I have no objection to that.

THE COURT: I don't think you have a thing to worry about there. I don't **[42]** believe there is any way under the sun that we can get any sort of a hearing with this tthree-judge court before October.

MR. ZWIENER: Thank you, Your Honor.

THE COURT: Hopefully, we can get it this year.

MR. ZWIENER: Thank you, Your Honor. As I say, I'm not sure that my fellow cohorts, the district city attorneys that are here, agree with my remarks, but I would of course prefer to make my argument to the three-judge panel after the Court of Criminal Appeals has hopefully come out with a new and more specific decision.

THE COURT: I don't mind saying that what I have ultimately in my mind, if it is at all practical—and I don't know whether it is practical or not, and I guess we will decide after I hear from all you attorneys—if we could get this case in some sort of a consolidated posture to where we could or you could select one or two attorneys from each side that could represent the whole consolidated case and we could just have a hearing and listen **[43]** everything or almost everything.

THE COURT: But I know the feeling of Judge Ingraham on these three-judge court cases. He doesn't want to have—he wants the managing judge to hold all the factual hearings if the

attorneys can't stipulate. He does not—he prefers not to have any hearings, factual hearings, on a three-judge court case.

* * *

[149] THE COURT: All right. How about this Tom Green County case?

MR. GRAVES: Your Honor, please, I think we have the classic case.

THE COURT: That's Judge Woodward's?

MR. GRAVES: Yes, sir. In this case there is no pending criminal prosecution. There is no pending civil prosecution. There was a threat of bringing a nuisance suit, which in the answer was more or less admitted. They had requested the landlord to cancel the lease or, if not, that they would then proceed with a nuisance suit against the King Arts Theatre.

So we have in this case the nuisance statute for determination and the use of the obscenity definition in the nuisance **[150]** statute, so it raises the issue of whether the obscenity definition is constitutional.

THE COURT: Who represents the defendants in this case?

MR. FLUSCHE: I do, Your Honor, Max Flusche from the Attorney General's office.

THE COURT: The Attorney General's office represents all the defendants in this case, does it not?

MR. FLUSCHE: In King Arts?

THE COURT: Yes, sir.

MR. FLUSCHE: Yes, sir.

THE COURT: Out of Tom Green County?

MR. FLUSCHE: Yes, sir.

THE COURT: Yes.

MR. FLUSCHE: I think Mr. Graves has correctly stated the issues in this case. It's pretty clean cut and it involves the constitutionality of the obscenity statute and the constitutionality of the nuisance statute and the question of whether or not the nuisance statute can utilize the definition of obscenity that is contained in the obscenity statute.

There is no question of bad faith **[151]** harassment here. I believe you state that there was no bad faith harassment——

MR. GRAVES: No.

MR. FLUSCHE: ——there is no pending criminal or civil prosecution, and it is——

THE COURT: Why don't we just enjoin everything else and just take this case and just let all the rest of these cases tag along?

MR. GRAVES: Your Honor, I'd be glad——

THE COURT: Just issue some sort of an injunction enjoining any other proceedings in any of the rest of these cases pending the determination of your case? Isn't this the cleanest case we have?

MR. GRAVES: Yes, sir, I think it is. I've looked at all of them. This is the cleanest one, with just threatened prosecution.

MR. KAUFMAN: Respectfully, Your Honor, in reference to old Article 527, I don't believe this case takes that into account unless you would like to throw it in the same **[152]** ball of wax, because we do have some attacks on 527 outstanding in our cases.

MR. GRAVES: It's in there, too.

MR. FLUSCHE: It is, too.

THE COURT: Is the search and seizure under the new——

MR. GRAVES: No, sir. No search and seizure.

MR. FLUSCHE: No search and seizure.

THE COURT: Is the new criminal instrument statute?

MR. GRAVES: No, sir. We will need the search and seizure and the criminal instruments, and the Dexter case is pretty good from San Antonio.

MR. ARANSON: I was going to comment that Mr. Ausburn's case on the criminal instrumentality, 16.01, is almost classic. And then we've got the case involving 18.02, which is that Fort Worth Ellwest case. That is pretty classic.

THE COURT: What you're saying is I could take those three cases, hold all the rest of them in abeyance——

[153] MR. AUSBURN: Right.

THE COURT: ——and just proceed on those three cases? Is that what you are saying?

MR. ARANSON: I believe we can, Your Honor, providing we don't have any threshhold questions again. As I said before, it would seem that the Mitchum v. Foster approach would preclude that.

THE COURT: You make a very—it's very appealing for me to do something that cuts through some sort of—cuts this down some way, because I get—I think all the judges would just end up getting confused and chasing more rabbits than we would like to chase in these cases if we do not do something along this line.

I had not thought about it, but I know—I've talked to Judge Woodward over the telephone about his case and I did know that it is his feeling that it represents a rather classic situation, to clear the air on this matter. So if we took——

MR. FLUSCHE: Of course, Your Honor, let me say this, that the factual basis **[154]** for the issuance of an injunction case in King Arts Theatre may be not as compelling as it is or not as strong as it is in other cases.

THE COURT: Well, you all have an agreement up there, do you not, that everything can just stay like it is?

MR. GRAVES: Yes, sir. They filed no injunction proceedings.

THE COURT: As I understand from Judge Woodward everybody just had an agreement that everything would stay like it is and there would be no injunction issued or anything until we could get the matter resolved in this three-judge court.

* * *

[158] THE COURT: Yes. Okay. So as to the King Arts v. McCrea, I could take and get you gentlemen to prepare what we use here in this Court and in Judge Seale's and in Judge Bue's. We have a common pretrial procedure and a pretrial order. I could give you the **[159]** form for that, get you to fill it out. It contains the stipulated facts, and so on and so forth.

We could do that in your case and reach the constitutional problems involved, right?

MR. GRAVES: Yes, sir.

THE COURT: Then you think I ought to take one of those—one of the Dallas cases?

MR. ARANSON: Your Honor, we have that old Section 13 case which we have, you know, the order for injunction on that may deal in some way with this case.

THE COURT: They seem to think that it would.

MR. ZWIENER: Your Honor, the Section 13, which is injunction proceeding, is a new nuisance statute which is also an injunction proceeding. It has the same constitutional questions, prior restraint, doesn't it?

* * *

[167] THE COURT: Let's just take the King Arts case. Could you gentlemen in the King Arts give us—that is, the three judges—an agreed statement of the case?

MR. GRAVES: I think we could.

MR. FLUSCHE: I believe so, Your Honor.

[168] THE COURT: And a stipulation as to the facts?

MR. GRAVES: Yes, sir.

MR. FLUSCHE: I'm sure we can.

THE COURT: Enumerate the legal issues involved?

MR. GRAVES: Yes.

THE COURT: And the statutes obviously involved?

MR. GRAVES: Yes, sir.

THE COURT: That would be in the enumeration.

File briefs. Anybody in any of the other cases could file an amicus brief.

Okay? Can we proceed that way in your case?

MR. GRAVES: Yes, sir.

MR. ZWIENER: Your Honor, the only thing that occurs to me is they don't have an order to their case, an injunction enjoining future showings, which we do.

THE COURT: Judge Woodward tells me that that's no problem. They have all entered into some sort of agreement that they are going to preserve the status quo.

[169] MR. ZWIENER: What I really referred to is an injunction against the theater from showing obscene materials and whether or not it's carefully drawn. How are you going to solve that problem in your case?

MR. GRAVES: I think the legal issue is prior restraint; can they issue an injunction that says you won't show in the future, quote, obscene film, unquote.

* * *

[198] THE COURT: Could anybody else give me an agreed—write me some sort of a temporary injunction that would be agreed to by everybody?

MR. GRAVES: Your Honor, may I suggest Mr. Flusche or Mr. Zwiener, that they seem to be in all the cases and I've found them very reasonable people, supply reasonable **[199]** answers?

THE COURT: Will you all do that?

MR. COIL: May it please the Court, I'll be happy to join another lawyer to write the order.

THE COURT: Mr. Zwiener, you and Mr. Flusche, can't you all give me some sort of an order?

MR. ZWIENER: Yes, sir, we will, Your Honor, under the condition, of course, that I may turn around and address my fellows here and say that I'm doing it under the instructions of the Court.

THE COURT: Okay. You are.

* * *

[200] MR. ZWIENER: I am familiar with the case. Leave that out. Of course, this Austin Book Store case, we are under an injunction, too, I believe, Your Honor.

THE COURT: Right. But as I understand—now, that case, you all sort of agreed to it, haven't you? Can't you operate under an agreed order?

MR. ZWIENER: Yes, sir.

APPENDIX B

No. 78-2055-C

Henry Wade, District Attorney of Dallas County, Texas and Lee E. Holt, City Attorney of the City of Dallas, Texas, Plaintiffs, vs. Richard Joseph Haddad, Charles E. Carlock, Thomas Lynn Edmiston, Marlin Babb and Mateo Espindola, Defendants.	In the District Court Dallas County, Texas 68th Judicial District

Order Granting Temporary Injunction

On April 6 and 7, and on June 29 and 30th, 1978 the Court considered the application of Plaintiffs Henry Wade, District Attorney of Dallas County, and Lee E. Holt, City Attorney of the City of Dallas, for a temporary injunction pursuant to article 4667, Tex.Rev.Civ.Stat.Ann., after due notice to Defendants Charles E. Carlock and Thomas Lynn Edmiston, as ordered by the Court, and the Plaintiffs and Defendants Charles E. Carlock and Thomas Lynn Edmiston having appeared by and through their attorneys of record, and the Court having heard the evidence finds that Defendants Charles E. Carlock and Thomas Lynn Edmiston have engaged in the habitual use of, and have been parties to the use of, the premises or building or a part of a building located at 11128 Harry Hines Boulevard, Dallas, Dallas County, Texas, being further described as lot 10, block C/6521, in the City of Dallas, Dallas County, Texas, and being further described as:

That certain lot, tract or parcel of land, lying and being situated in the County of Dallas, State of Texas, more fully described as follows, to-wit:

BEING a tract of land out of the WM. MOONEYHAN SURVEY, ABSTRACT NO. 946, and more particularly described by metes and bounds as follows:

BEGINNING on the Northeast line of U. S. HIGHWAY NO. 77, 313.4 feet Southeast of the intersection of the Northeast line of U. S. HIGHWAY NO. 77, with the North line of a 22¾ acre tract;

* * * * * * * *

THENCE in a Northwesterly direction, parallel to the East line of U. S. HIGHWAY NO. 77, 50 feet to a point for corner;

THENCE in a Westerly direction, 135 feet to the PLACE OF BEGINNING, and being also known as a part of LOT 10 in BLOCK "C", according to an unrecorded Map of JACK LIVELY'S SUBDIVISION in said Survey,

for the commercial exhibition of obscene material on December 5, 1977, December 22, 1977, January 5, 1978, January 6, 1978, January 17, 1978 and January 18, 1978 by commercially exhibiting at that location certain motion picture films, each of which has as a whole a dominant theme that appeals to an interest of the average person in human sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct, applying contemporary community standards; which films depict in a patently offensive way contact between the genitals of one person and the mouth or anus of another person, and contact between a human female sex organ and a human male sex organ, and patently offensive representations of human masturbation; and which films lack serious literary, artistic, political or scientific value.

The Court, having so found, and having considered the authorities and arguments of counsel, concludes that the habitual use of the hereinabove described premises for the commercial exhibition of obscene material constitutes a nuisance and that Plaintiffs are entitled to the temporary injunction prayed for.

It is therefore ordered that the temporary injunction prayed for be, and it is hereby, granted against Defendants Charles E. Carlock and Thomas Lynn Edmiston, their agents, employees and all persons acting in concert with them, and that the Clerk of this Court issue a writ of injunction, pending final hearing and determination of this cause, restraining and enjoining Defendants Charles E. Carlock and Thomas Lynn Edmiston, their agents, employees and all persons acting in concert with them, from commercially exhibiting within the premises or building or any part of a building located at 11128 Harry Hines Boulevard, Dallas, Dallas County, Texas, being further described as lot 10, block C/6521 in the City of Dallas, Dallas County, Texas, and being further described as:

> That certain lot, tract or parcel of land, lying and being situated in the County of Dallas, State of Texas, more fully described as follows, to-wit:
>
> BEING a tract of land out of the WM. MOONEYHAN SURVEY, ABSTRACT NO. 946, and more particularly described by metes and bounds as follows:

and:

* * * * * * * *

> All that certain lot, tract or parcel of land situated in Dallas County, Texas, to-wit:
>
> BEING a tract of land 50 feet by 135 feet, a part of the WM. MOONEYHAM SURVEY, ABSTRACT NO. 946 and more particularly described by metes and bounds as follows:

> BEGINNING on the Northeast Line of U.S. HIGHWAY NO. 77, 263.4 feet Southeast of the intersection of the Northeast Line of U.S. HIGHWAY NO. 77, with the North line of a 22¾ acre tract;
>
> THENCE Southeast, along the East line of U.S. HIGHWAY NO. 77, 50 feet to a point for corner;
>
> THENCE in a Northeasterly direction, 135 feet to a point for corner;
>
> THENCE in a Northwesterly direction, parallel to the East line of U.S. HIGHWAW NO. 77, 50 feet to a point for corner;
>
> THENCE in a Westerly direction, 135 feet to the PLACE OF BEGINNING, and being also known as a part of LOT 10 in BLOCK "C", according to an unrecorded Map of JACK LIVELY'S SUBDIVISION in said Survey,

any motion picture film which has as a whole a dominant theme that appeals to an interest of the average person in human sexual conduct that goes substantially beyond customary limits of candor and description or representation of such conduct, applying contemporary community standards; which film depicts or describes in a patently offensive way contact between any part of the genitals of one person and the mouth or anus of another person, or contact between a human female sex organ and a human male sex organ, or contact between a person's mouth or genitals and the anus or genitals of an animal or fowl, or patently offensive representations of human masturbation or human excretory functions; and which film lacks serious literary, artistic, political or scientific value.

Dated: June 30, 1978.

/s/ OWEN GILES
Judge, Presiding

0957B/jn

CLERK'S CERTIFICATE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

I, BILL SHAW, Clerk of the District Courts of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of ORDER GRANTING TEMPORARY INJUNCTION in Cause No. 78-2055-C, entitled HENRY WADE, ET AL. vs. RICHARD JOSEPH HADDAD, ET AL. as the same appears of record in my office in Vol. C-48, Page 417, Minutes of the District Court of Dallas County, for the 68th Judicial District of Texas.

GIVEN UNDER MY HAND AND SEAL of said Court, at office in Dallas, Texas, this the 3rd day of JULY, A.D. 1978.

BILL SHAW
Clerk of the District Courts,
Dallas County, Texas

By /s/ SUZANNE BUNGER
Deputy

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

Supreme Court, U. S.
FILED
AUG 27 1979
MICHAEL RODAK, JR., CLERK

NO. 78-1588

CAROL VANCE, ET AL.,

Appellants,

V.

UNIVERSAL AMUSEMENT CO., INC., ET AL.,

Appellees.

GEORGE E. McCREA, ET AL.,

Appellants,

V.

KING ARTS THEATRE, INC.,

Appellees.

* * *

On Appeal From The United States Court of Appeals For The Fifth Circuit

* * *

BRIEF FOR THE APPELLANTS

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 78-1588

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V.

KING ARTS THEATRE, INC.,
Appellees.

* * *

On Appeal From The United States Court of Appeals For The Fifth Circuit

* * *

BRIEF FOR THE APPELLANTS

* * *

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Fifth Circuit (Jurisdictional Statement Appendix I) is reported at 559 F.2d 1286. On rehearing en banc, the Court in its opinion entered on December 18, 1978, held that Article 4667(a)(3), Vernon's Texas Civil Statutes was unconstitutional, (Jurisdictional Statement Appendix II) the opinion being reported at 587 F.2d 159. Eight judges voted with the majority

opinion and six judges dissented. The opinion of the District Court is reported at 404 F. Supp. 33.

JURISDICTION

Notice of Appeal was filed on January 15, 1979, and on March 9, 1979, Mr. Justice Powell extended the time in which to docket an appeal to and including April 17, 1979. The appeal was timely docketed, and probable jurisdiction was noted on June 11, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1254(2).

QUESTION PRESENTED

Whether the Texas nuisance statute (Article 4667(a)(3), Vernon's Texas Civil Statutes) is unconstitutional for the reason that it acts as a prior restraint on the exercise of rights guaranteed by the First Amendment of the Constitution of the United States.

STATUTE INVOLVED

The Texas nuisance statute, Article 4667, Vernon's Texas Civil Statutes, reads in pertinent part as follows:

> Injunctions to abate public nuisances
>
> (a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the state or any citizen thereof:
>
> (1) . . . .
>
> (2) . . . .
>
> (3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

Article 4666, Vernon's Texas Civil Statutes is not involved in the appeal by Appellants Vance and McCrea. This Article permits the mandatory closing of premises in certain nuisance situations; however, this provision was never applied by these Appellants, was not a part of their appeal to the Court of Appeals and the ruling of the Court of Appeals (majority opinion)--that the closing provisions are unconstitutional as applied to motion picture houses or bookstores--is not questioned by these Appellants in this Court.

STATEMENT OF THE CASE

Proceedings Below

Twenty cases involving the question presented by the appeal as well as other questions were consolidated before a three-judge court. That court determined that Article 4667(a)(3) was unconstitutional, the opinion being reported at 404 F. Supp. 33, and an appeal was made to the United States Court of Appeals with the results described above.

A concurrent appeal to the Court of Appeals was made by Ted Butler, Bexar County District Attorney, and Emil Peters, City Attorney of the City of San Antonio, Texas. The appeal involved in part Article 4667(a)(3) but, in the main, concerned other statutes of the State of Texas. The Court of Appeals ruled against these parties in *Dexter v. Butler*, 559 F.2d 1287 (1977), 587 F.2d 176 (1978) and application for a writ of certiorari was made to this Court. Certiorari was denied on June 11, 1979.

The Injunctive Process Under Article 4667

No injunction prohibiting the dissemination of obscene materials was entered in the Fifth Circuit titular case, *King Arts Theatre, Inc. v. McCrea.* The lead case, *Universal Amusement Company, Inc. v. Vance*, the original case before the three-judge district court, was

settled and became merely the vehicle for the appeal to the Court of Appeals for all consolidated cases except for *Dexter v. Butler*, wherein a separate appeal was taken both to court below and to this Court.

However, in some of the other consolidated cases a state court injunction was issued. In the case of *State v. Stambaugh*, No. 216,943 in the 126th Judicial District Court of Texas, an injunction enjoined the manager of an Austin bookstore and movie arcade from using the premises to disseminate obscene materials. That state case and injunction was questioned in *San Antonio Book Mart, Inc., d/b/a Austin Book Mart v. Smith, et al.*, a cause filed in the United States District Court for the Western District of Texas, Austin Division, and one of the cases consolidated with *Universal* in the three-judge district court. A copy of the injunction is attached as Appendix III to the Jurisdictional Statement to illustrate the kind of injunction entered pursuant to Article 4667(a)(3). The injunction is drawn in accordance with the Texas law in this sensitive area of prior restraint which in turn follows the law of this Court in determining the validity of such restraint. See *Moore v. Texas*, 470 S.W.2d 391 (Tex. Civ. App. - San Antonio 1971); *Richards v. Texas*, 497 S.W.2d 770 (Tex. Civ. App. - Beaumont 1973); and *Locke v. State*, 516 S.W.2d 949 (Tex. Civ. App. - Texarkana 1974).

In *State v. Stambaugh*, No. 216,943 in the 126th Judicial District of Texas (Jurisdictional Statement Appendix III), the injunction comports with the obscenity standards of *Miller v. California*, 313 U.S. 15 (1973), adopted by Texas in *State v. West*, 489 S.W.2d 597 (Tex. Crim. App. 1973). In essence, the Article 4667(a)(3) injunction enjoins only films, books and magazines wich depict:

(1) Sexual intercourse.

(2) Oral and anal sodomy, and

(3) Bestiality

and which further:

(1) Have a dominant theme which taken as a whole appeals to the prurient interest in sex, nudity or excretion,

(2) Portray sexual conduct in a patently offensive manner, and

(3) Do not have, when taken as a whole, any serious literary, artistic, political or scientific value.

Moreover, notice should be taken that the judge in his order issued in *State v. Stambaugh, supra* indicated his refusal to enter a temporary restraining order without notice and hearing in an obscenity-oriented injunction proceeding.

An injunction in the form entered above, as required by Texas law and the decisions of this Court, presents a dubious tool for the control of obscenity. Under Texas law, the complainant must prove, after notice to a claimed violator of the injunction, all of the terms of the injunction: a depiction of sexual intercourse, sodomy or bestiality *plus* the *Miller v. California* requirements, prurient interest, patent offensiveness and lack of literary, artistic, political or scientific value. See Rule 692, Texas Rules of Civil Procedure, which provides:

> Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending or with the judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting the same; and thereupon the

> court or judge shall cause to be issued an attachment for such person, . . . or said court or judge may issue a show cause order, directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. On return of such attachment or show cause order, the *judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction*, either directly or indirectly, may commit such person to jail without bail until he purges himself of such contempt, ... [Emphasis supplied]

And see *Locke v. State, supra*, wherein the Court observed, in considering a possible contempt hearing for the showing of obscenity, that:

> . . . the State will have the burden to prove that the exhibition comes within the narrow limits of the injunction. Under these circumstances there appears to be no danger that protected matter will be suppressed or that the appellant will have any doubt about the legality of his future conduct.

Thus, each alleged violation of an injunction must be shown by proof by the complainant, and the violator need only purge himself of contempt by agreeing not to exhibit or sell the offending material.

Accordingly, the injunction is not an imposing weapon with which to combat obscenity. However, the efficacy of the injunction as opposed to criminal statutes for obscenity control, is not in question in this case, but the very cumbersomeness and the ineffectualness of the injunction process illuminates the basic issue and its answer: an Article 4667(a)(3) injunction does not prohibit the dissemination of possible First Amendment material any more than do the Texas

criminal statutes, and probably less and such an injunction does not, therefore, constitute impermissible prior restraint.

ARGUMENT

1. Article 4667(a)(3) as Applied is Constitutional Under The Holdings Of This Court.

The majority opinion of the Court of Appeals finds fault with the temporary injunction procedures of Texas and finds that procedural safeguards are lacking, noting that the only test applied by a Texas court at a temporary injunction hearing is the showing of a "probable right" and a "probable injury." (Majority Opinion, 587 F.2d 170) The court then observes that on appeal from the temporary injunction the Appellant cannot argue that the suppressed material is not obscene. (587 F.2d 170) This interpretation overlooks the court's own earlier citations to *Moore v. Texas, supra*, and *Locke v. State, supra*, in which the appellate courts examined the validity of the temporary injunctions on appeal in terms of obscenity standards and not merely in the framework of "probable right" and "probable injury."

The Court of Appeals further overlooks the enforcement procedures of the Texas law which require proof of *Miller* standards at a contempt hearing. Thus, even if the majority opinion is correct with respect to the scope of appellate review, a contempt hearing will require the complainant to prove a full obscenity case, a situation no different than the filing of a criminal complaint and a resulting trial on the charge.

The majority opinion also ignores or misinterprets vital portions of the state court opinions in *Locke* and *Richards v. State, supra*, observing that the cases stand for the proposition that while an injunction cannot

merely prohibit the future showing of "obscene films," an injunction may validly enjoin the enhibition of "films portraying acts of sexual intercourse, deviate sexual intercourse and bestiality." The majority overlooks the portions of these opinions which also require that the foregoing acts generate the *Miller* requirements of (1) appeal to the prurient interest, (2) patent offensiveness and (3) the lack of redeeming social values.

The combination of enjoining the exhibition of films depicting specific acts, coupled with the requirement that such acts come within the *Miller* criteria, mandate the conclusion that a Texas court injunction against the showing of future obscenity is no more vague than any valid state or federal criminal statute prohibiting the dissemination of obscenity. Adding in the proof requirements of any contempt hearing, the obscenity injunction constitutes no greater prior restraint than any criminal statute.

2. While it is Questionable Whether Article 4667(a)(3) Imposes Prior Restraint, The Imposition of Prior Restraint is Constitutionally Permissible Under Appropriate Safeguards.

The majority opinion of the Court of Appeals holds:

> An injunction that forbids the showing of any film portraying the particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. . . . '[t]his is the essence of censorship.' (587 F.2d 169)

Apparently, the majority is condemning all prior restraint of possible First Amendment materials whatever the language of an injunction (or ordinance or statute) and regardless of the procedures required for proving violations of the injunction (or ordinance or statute).

This holding is not in accordance with the decisions of this Court which have recognized that prior restraint is permissible in certain situations. *Near v. Minnesota*, 283 U.S. 697 (1931); *Kingsley Books v. Brown*, 354 U.S. 436 (1957); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Time Film Corporation v. City of Chicago*, 365 U.S. 43 (1973); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546.

This Court observed in *Southeastern Promotions*, *supra*, that a system of prior restraint is permissible if:

> . . . it takes place under procedural safeguards designed to obviate the dangers of a censorship system. 420 U.S. at 559.

The procedural safeguards are present in the Texas injunctive process and Article 4667(a)(3), as applied, is constitutional.

CONCLUSION

For the reasons stated above, Appellants, the State of Texas, submit that Article 4667(a)(3), V.T.C.S., is constitutional on its face and in its application. Accordingly, the Appellants pray that the judgment of the Court of Appeals holding Article 4667(a)(3) to be unconstitutional, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, hereby certify that two copies of the above and foregoing Brief of Appellants have been served by placing same in the United States mail, postage prepaid, certified, on this the ___ day of August 1979, to each of the following: Frierson M. Graves, Jr., 2020 First Tennessee Building, Memphis, Tennessee 38103; and Gerald Goldstein, 2900 Tower Life Building, San Antonio, Texas 78205.

_____
LONNY F. ZWIENER

Supreme Court, U. S.
FILED
OCT 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1588

CAROL VANCE, ET AL.,
Appellants,

v.

UNIVERSAL AMUSEMENT CO., INC., ET AL.,
Appellees.

and GEORGE E. MCCREA, ET AL.,
Appellants,

v.

KING ARTS THEATRE, INC.,
Appellee.

On Appeal From The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

QUESTIONS PRESENTED

The appellee would submit in lieu of the general question presented by the appellants that the following questions are presented:

1. Is a state statute which authorizes the entry of an injunction restraining the exhibition of unidentified films, on pain of contempt, unconstitutional under the First and Fourteenth

Amendments because it authorizes a prior and permanent restraint against the exhibition of unnamed films prior to an adversary hearing at which a judicial determination of obscenity is made?

2. Is the Texas Nuisance Statute [Article 4667 (a) (3), Vernon's Texas Civil Statutes] which authorizes an injunction against any premises, place or building for the commerical manufacturing, distribution or exhibition of obscene materials unconstitutional as a prior restraint under the First and Fourteenth Amendments because of any or all of the following procedural deficiencies:

A. Neither the Statute nor the Texas Rules of Civil Procedure have any built-in procedural safeguards which are necessary when regulating materials presumed protected by the First Amendment.

B. The State can obtain an ex parte temporary restraining order for a ten day period.

C. A temporary injunction may be granted, not only against material in existence, but future unnamed motion pictures on the basis of "probable right" to the relief sought and that the evidence "tends" to support the cause of action.

D. A temporary injunction does not constitute a ruling on the merits or final adjudication of obscenity *vel non* of films in existence, nor adjudication that all such films with similar conduct are obscene.

E. Any appeal of a temporary injunction does not go to the merits of any past or future obscene material but whether the trial court abused its discretion in granting the temporary injunction.

F. There is no provision for a prompt final hearing on the merits.

G. There is no provision for a prompt judicial determination.

H. Past exhibition or distribution as well as continued exhibition or distribution of any unidentified materials presumed protected by the First Amendment subjects the person to a criminal contempt charge even though the injunction may be erroneous but not void, and the unnamed book, magazine or film has not been determined obscene before issuance of the contempt charge.

3. Is such a State statute unconstitutional under the First and Fourteenth Amendments because it authorizes the entry of an injunction restraining the exhibition of unidentified films under a public nuisance doctrine and therefore authorizes the imposition of absolute liability in the form of criminal contempt for the exhibition of an obscene film?

4. Should the *en banc* decision of the Fifth Circuit be affirmed that any statute which would authorize a one-year closure order against an establishment found to be a nuisance because of commercial obscenity, unless a penal bond of up to $5,000 is posted to insure against future violations of the nuisance laws is unconstitutional under the First and Fourteenth Amendments as applied to film exhibitors because the law authorizes the imposition of a prior restraint against the future exhibition of any film, whether obscene or not, upon a finding that obscene films have been exhibited in the past?

STATUTE INVOLVED

The Texas Nuisance Statute, Article 4667, *Vernon's Texas Civil Statutes,* is as follows:

(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute

a public nuisance and shall be enjoined at the suit of either the State of any citizen thereof:

(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;

(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;

(3) For the commercial manufacturing, commercial distribution, or commerical exhibition of obscene material;

(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;

(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.

(b) Any person who may use or be about to use, or who may be a party to the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney or City Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of.

STATEMENT OF THE CASE

In October of 1973, the King Arts Theatre, Inc. was operating a motion picture theatre for adults only in an enclosed theatre in San Angelo, Texas, showing sexually explicit films which it believed to be commercially acceptable. A notice was received from the landlord terminating the lease as of November 15, 1973, and conveying information that the County Attorney, George E. McCrea, had contacted the landlord stating he intended to bring an application for injunction as a nuisance (A. 38). On November 12, 1973, suit was filed by the Theatre and thereafter amended because of amendment of the Texas statute requesting declaratory judgment and injunctive relief and challenging the facial constitutionality of Article 4667 of the Texas Code which provided for the abatement of public nuisances (A. 28, 54). By agreement of all parties, the status quo was to be maintained until determination of the issue (A. 128). Chief Judge Brown of the Fifth Circuit Court of Appeals consolidated this case with the approximately twenty other cases before a three judge court in the Southern District of Texas. A pre-trial conference was held on August 12, 1974. In an effort to simplify the process of deciding all of various cases, three cases, which presented straight-forwardly the issues in the remaining cases were accepted. A pre-trial order was agreed upon between the parties in this cause and entered setting forth the contentions of the parties and the contested issues (A. 65). The three judge district court determined that Article 4667 (a) (3) was unconstitutional, (A. 74) and an appeal was taken to the United States Court of Appeals for the Fifth Circuit. A panel of the Court divided on the ruling and upon rehearing en banc the court in its majority opinion determined Article 4667 (a) (3) of *Vernon's Texas Civil Statutes* was unconstitutional.

The Court of Appeals in its opinion determined that Article 4666 of *Vernon's Texas Civil Statutes* which provided for a one-year closing remedy and bond provisions was inapplicable to

obscenity and that the injuncive relief provided in Article 4667 was the exclusive procedure for abating obscene exhibitions as nuisances. It further stated that if Article 4666 could be applied to nuisances as defined in Article 4667 that the statutes would be patently unconstitutional insofar as they pertain to obscenity and would constitute an impermissible prior restraint since the State would be enjoining the future operation of a business which disseminates presumptably First Amendment protected material solely on the basis on the nature of the materials which were sold in the past.

The majority of the Court of Appeals for the Fifth Circuit further held that a nuisance statute as applicable to obscenity under Article 4667 (a) (3) lacks the procedural safeguards required in dealing with the publications presumed protected by the First Amendment.

The Court of Appeals also decided that an injunction against future exhibition of *unnamed future films* could not stand for it amounts to an impermissible prior restraint on materials not yet declared obscene.

The State of Texas appealed but did not question the ruling of the Court below that the closing provisions of Article 4666 are unconstitutional if applied to motion picture houses or book stores. The questions presented by the State of Texas is whether the Texas Nuisance Statute, Article 4667 (a) (3) is an impermissible prior restraint upon the exercise of First Amendment rights or lacks procedural safeguards so as to be an impermissible prior restraint upon the exercise of rights guaranteed by the First Amendment.

SUMMARY OF THE ARGUMENT

1. A statute which authorizes an injunction against the exhibition and distribution of unidentified and unnamed films, magazines and books prior to a judicial determination of obscenity violates the First and Fourteenth Amendments and is unconstitutional. Such a statute authorizes the issuance of broad injunctions against materials not identified or named or even necessarily in existence but which may, at some future date, be found obscene under the definition of obscenity. The statute authorizes the State Judiciary literally to remove entirely from the public domain in advance of any judicial determination of obscenity publications and films which the distributor restrained must remove because such materials could be found obscene by a single judge sitting without a jury. This is impermissible and unlawful prior restraint and the decision of the Fifth Circuit Court of Appeals should be affirmed.

The Court must measure the impact of the state statute upon the distribution of nonobscene materials. A civil adjudication of obscenity where procedural requirements are satisfied would give the best possible notice that the material is unlawful and further distribution would expose the distributor to the risk of criminal penalties. An injunctive procedure against particular items has the saving grace of a degree of certainty in an area of law which the court concedes retains a degree of uncertainty. The original civil injunction, under the Texas statute enables the state to relieve itself of the burden of proving the obscenity of the material beyond a reasonable doubt. The drastic remedy of injunction is imposed by a single judge on a preponderance of the evidence increases the margin of error inherent in erroneous suppression of constitutionally protested material. The lesser burden of proof increases the hazard of self-censorship and also exposes the distributor to contempt citations for future unnamed material when the injunction was issued on this lesser burden of proof.

Another danger is it allows the state to bypass a jury determination. Although the use of civil injunctions imposes dangers the use of the Texas procedure drastically transgresses the limitations imposed by Court since the order enjoins the defendant from distributing the work adjudicated obscene and from distributing any and all other books, magazines and films which are obscene under the law of Texas as specified by that judge. The distributor in self-censorship has the burden to remove all books or films which could ultimately be found obscene or else be guilty of contempt. This Court has never sanctioned the kind of injunctive relief so authorized by the Texas statute and this Court has taken great care to point out that restraint should not be granted against materials which are not before the Court and not yet adjudicated obscene.

Texas would authorize the state courts to paint with a broad brush the injunction which is an impermissible prior restraint. An injunction against the distribution of unnamed obscene films in the future fails to take into account the fundamental distinction in our constitutional jurisprudence between prior restraint and subsequent punishment. The chief purpose of the First Amendment is to prevent previous or prior restraints and to provide a broader degree of protection against prior restraint than it affords against subsequent punishment. The First Amendment abhors prior restraint and prefers subsequent punishment. The coercive nature of such an injunction against future distribution will lead a distributor to steer wide of the danger zone by removing all borderline material which will inevitably result in denying public access to constitutionally protected material Strict liability would be imposed.

The Fifth Circuit Court of Appeals should be affirmed that such an injunction against future materials prior to a judicial determination of obscenity is an impermissible prior restraint under the First and Fourteenth Amendments.

2. The Texas nuisance statute lacks procedural safeguards and because of these procedural deficiencies is an unconstitutional prior restraint under the First and Fourteenth Amendments. A limited injunction procedure with built-in safeguards was approved by this Court in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 437. The teaching of that case and all cases thereafter by this Court is that adequate procedures are required to ascertain whether certain materials are obscene to insure the necessary sensitivity to freedom of expression. It is for that reason that before there can be a prior restraint in one of the narrowly defined exceptions to the prohibition against prior restraints, there must be built-in procedural safeguards that reduce the danger of suppressing constitutionally protected speech.

Any restraint should be postponed until a judicial determination of obscenity is made following notice at an adversary hearing. The Court should provide for a prompt hearing on the merits and the Court should hand down a decision promptly after termination of the hearing.

The Texas statute has no built-in procedural safeguards nor do the Texas Rules of Civil Procedure provide such safeguards as are required by the First Amendment. The Texas decisions do not provide any authoritative judicial construction of procedures. The State of Texas can obtain an ex parte temporary restraining order for up to a ten day period and can thereafter obtain a temporary injunction upon notice which does not constitute a ruling on the merits or a final adjudication of obscenity but the injunction is granted on the basis of probable right or probable injury. The temporary injunction is subject to appeal only on whether or not the trial court abused its discretion in granting the temporary injunction. There is no provision either in the statute or in the Texas Rules of Civil Procedure nor by judicial construction that there must be a prompt, final hearing on the merits or a prompt judicial determination, which are

both necessary. Finally, after an injunction is issued an exhibitor or theatre operator for some exhibition in the past could be charged with criminal contempt as well as civil contempt subjecting him to a fine of $500.00 and imprisonment for six months without a jury trial plus possible civil contempt of jailing for failing to surrender the motion picture film or book or magazine or promising to stop continued exhibition.

The Fifth Circuit Court of Appeals decision is correct that the Texas statute, Article 4667(a)(3) is unconstitutional as lacking procedural safeguards.

3. A state statute authorizing an injunction under a public nuisance doctrine restraining the exhibition of unidentified films in the future and authorizing the imposition of absolute liability in the form of criminal contempt is unconstitutional.

Any system of prior restraint comes to the Court with the heavy presumption against its invalidity and such a use of the public nuisance doctrine would be a prior restraint. This Court has always determined that only a judicial determination in an adversary proceeding insures the necessary sensitivity to protect freedom of expression. The injunction would not be limited to the materials in existence and presented to the Court but would premit a court to draft an injunction setting forth sexual conduct which, if portrayed, the Court would find obviously obscene. Public nuisance, which usually relates to odors or such conduct as intoxicating liquors or prostitution is neither designed nor suitable for future injunctions against unnamed publications in which the person may be both guilty of both criminal contempt and civil contempt with subsequent punishment without a jury.

The court or judge would become a censor and the operation and effect of such an injunction would be the essence of censorship.

The majority opinion of the Fifth Circuit that a blanket ban on the showing of the films not judicially declared to be obscene should not be sustained on the basis of attempting to interweave threads of language from obscenity statutes is correct. A listing of forbidden acts begs the question since no one can know in advance whether a film is legally obscene. Each motion picture film must be judged on its own merits and taken as a whole. Likewise, contemporary community standards must be applied by the fact finder. A limited civil injunction proceeding should not be extended.

This Court has suggested a finding of obscenity in a civil action might be in the best interests of all and that no criminal action can be brought until after the civil action determination and a further exhibition and distribution. The nuisance statute does not give this protection but tries both obscenity and the punishment at the same time without the usual protections of criminal proceedings. It is similar to the seizure without a hearing.

The Texas statute permits private individuals, as well as government officials, to bring suit so that a private individual could bring a nuisance action against a book publisher, a newspaper, a book store, a motion picture theatre, or any other exhibitor, distributor or manufacturer of material presumed protected by the First Amendment and hopefully find a judge to grant such an injunction. The practical effect of this prior restraint is obvious. This Court, on occasions, has reversed, as well as other appellate courts reversed, findings of obscenity where communities have overstepped the bounds such as enforcement.

A motion picture, just as a book or magazine, may be commercial speech, but it also is protected by the First Amendment. The fact that material is sold does not deprive it of protection by the First Amendment.

A nuisance statute could also apply to newspapers. A statute applied to motion picture theatres showing films containing sex or book stores which sell magazines and books containing sexual pictures or descriptions can also be applied to newspapers since there is no limitation in the statute. The nuisance statute could likewise be applied to commercial manufacturers, such as book publishers or printing houses, or even publishers of newspapers.

The practical effect of the statute is the prior restraint since obscenity is a question of fact to be measured by contemporary community standards of the community. It would be impossible for the judge in an injunction order to freeze the definition of contemporary community standards. The injunction is not to exhibit certain sexual conduct which the court in the future might find obscene if presented to him. The material would be prior restrained and never have the opportunity of facing the acid test of acceptance under prevailing of community standards.

The application of an injunction against future publications promotes uneven and improper applications. The difference in the injunctions issued in Austin, Texas, as cited by the State of Texas, in comparison with the injunction in the appendix applied by the court several years later to Dallas, Texas, shows the uneven application. The judge *has unlimited discretion in framing the injunction.* The trial judge, in issuing a temporary or permanent injunction, would be permitted to pick and choose what ultimate sexual acts, actual or simulated, or other sexual conduct would be in the injunction.

Any injunction should only be the limited exception permitted by this Court against material which has been presented to the Court in a judicial determination and found obscene and which thereafter is exhibited or distributed so that the distributor would know that he had violated the injunction.

Otherwise, public nuisance against future publications is prior restraint and coming in the back door against obscenity by punishing under the guise of contempt the exhibitor.

There is so much uncertainty and so much chance exists for mischief that the use of public nuisance statutes as a tool for controlling obscenity is not sensitive enough to withstand the requirements by this Court for dealing with obscenity and is an impermissible prior restraint.

4. The Fifth Circuit Court of Appeals found that the Texas nuisance statute could not be construed so as to permit the closure of a theatre for one year as a nuisance unless a penal bond was posted. The State of Texas conceded in its Brief and Jurisdictional Statement that the mandatory closing under a nuisance statute would be unconstitutional as applied to motion picture houses or book stores. The Court should affirm, as a precautionary measure, because of abuses in lower courts as shown by the cases cited by the Fifth Circuit. The closing of the theatre creates an *in terroram* effect, a draconian effect and a sledge hammering of the printing press, camera and all the tools of expression by closing a theatre because of past actions and thereby prohibiting the showing of any motion picture in the future which would be presumed protected by the First Amendment and likewise prohibiting future sales of presumed protected books.

5. King Arts Theatre, as the prevailing party, is entitled to an award of attorney's fees as authorized by the Attorney's Fees Award Act of 1976. In accordance with this Court's holding in *Hutto* v. *Finney,* U.S. , 98 S.Ct. 2565, the cause should be remanded to the managing judge for an award to the appellee of reasonable attorney's fees and costs.

ARGUMENT

1. Article 4667(a)(3), Texas Revised Statutes, Which Authorizes An Injunction Against The Exhibition And Distribution Of Unidentified And Unnamed Films, Magazines And Books Prior To A Judicial Determination Of Obscenity Is Unconstitutional Under The First And Fourteenth Amendments.

Texas Revised Statutes, Article 4667(a)(3), authorizes the courts of the state of Texas to enjoin, as a public nuisance, the manufacture, distribution and exhibition of obscene publications and films. The Texas courts which have interpreted this provision have concluded that its authority to enjoin is not limited merely to restraint against particular films and publications which have been judicially declared obscene after an adversary hearing; rather, the statute authorizes the issuance of broad injunctions against the circulation of materials not identified or named or even necessarily in existence, but which may, at some future date, be found obscene under the definition of obscenity in force in Texas and spelled out in the injunction. *Richards* v. *State,* 497 S.W. 2d 770 (Tex. Civ. App. - Beaumont, 1973); *Locke* v. *State,* 516 S.W. 2d 949 (Tex. Civ. App. - Texarkana, 1974); *Wade* v. *Haddad,* No. 78-2055-C, District Court, Dallas County, 68th Judicial District 1978);[1] *State* v. *Stambaugh,* No. 216943, District Court, Travis County, 126th Judicial District (1974).[2] Thus, the statute authorizes the state judiciary literally to remove entirely from the public domain, in advance of any judicial determination of obscenity, publications and films which the distributor restrained must, under the terms of the injunction, remove from his bookshelves and film library because such materials *could* be found obscene by a single judge, sitting without a jury. The Fifth Circuit Court of Appeals determined that the kind of injunctive relief sanctioned by Article 4667(a)(3) constitutes a blatant and unlawful prior restraint, in violation of the First and Fourteenth Amendments and, consequently, declared the statute unconstitutional. That decision should be affirmed.

[1]The injunction entered in the *Wade* case is set forth at pp. A-10 - A-13 of the appellee's Motion to Affirm or Dismiss, filed with this Court.

[2]The injunction entered in the *Stambaugh* case is set forth at Appendix III of the appellants' Jurisdictional Statement filed with this Court.

This Court has recognized that the states are not limited exclusively to the remedies of the criminal law in combatting the dissemination of publications and films which are not entitled to the protection of the First Amendment because of their obscene content. *Kingsley Books* v. *Brown,* 354 U.S. 436 (1957). Rather, the Court has held that, if certain constitutionally mandated procedureal safeguards are scrupulously followed, a civil action brought by the state to enjoin the distribution of particular named films or publications is constitutionally permissible. *Kingsley Books, supra; Freedman* v. *Maryland,*380 U.S. 51 (1965); *see also, Times Film Corp.* v. *City of Chicago,* 365 U.S. 43 (1961).

In assessing the constitutional validity of state attempts to prevent by injunction the circulation of particular materials thought to be obscene, the Court has consistently measured state procedures by their impact upon the distribution of non-obscene materials. The Court has been vigilant to insure that whatever procedures are adopted by the state and federal governments are impotent to suppress constitutionally protected literature. *Freedman, supra; Tietel Film Corp.* v. *Cusack,* 390 U.S. 139 (1968); *Blount* v. *Rizzi,* 400 U.S. 410 (1971); *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971).

Thus, the Court has concluded that in order to assure non-obscene material the constitutional protection to which it is entitled, a governmental procedure designed to restrain the circulation of allegedly obscene material must include the following safeguards: (1) the government must bear the burden of proving that the film or publication in question is obscene; (2) no final restraint may be imposed except upon a judicial determination of obscenity following an adversary proceeding initiated by the government; (3) any restraint imposed pending final judicial resolution of the question of obscenity must be limited in duration to the shortest fixed time consistent with sound judicial resolution; and (4) prompt final judicial resolution must be assured. *Freedman, supra; Blount* v. *Rizzi, supra.* Only when these procedural safeguards have been strictly observed and only when the restraint has been directed against specifically identified items adjudged obscene after an adversary hearing and not against materials which were not before the court, has this Court approved the issuance of an injunction against the distribution of obscene materials. *Kingsley Books, supra; see Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973).[3]

At the same time, the Court has noted that, when such procedural requirements *are* satisfied, a civil injunctive proceeding directed against particular films or publications, even though its purpose is to impose a prior restraint, possesses certain attributes to commend itself, in terms of First Amendment values, over the use of a criminal statute which does not previously restrain but rather subsequently punishes. A civil adjudication

[3]As is demonstrated *infra,* in Argument II, Article 4667 (a) (3) of the Texas Revised Civil Statutes is unconstitutional because it fails to include the safeguards which this Court, in *Freedman,* held are constitutionally required. In the instant argument, the Appellees contend that, apart from the procedural deficiencies of Article 4667(a)(3), the statute is unconstitutional because it authorizes substantive relief which is in direct conflict with the First and Fourteenth Amendment.

of obscenity, the Court has observed, gives a distributor of literature or films the best possible notice that his merchandise is unlawful *before* he is exposed to the risk of criminal penalties for its distribution. *Paris Adult Theatre I* v. *Slaton, supra,* at 413 U.S. 55; *Kingsley Books* v. *Brown, supra,* at 354 U.S. 442; *see also, McKinney* v. *Alabama,* 424 U.S. 669, 679 (1976) (Brennan, J., concurring). Thus, an injunctive procedure directed at particular items has, at least, the saving grace of importing a degree of certainty into an area of the law which even the members of this Court comprising the majority in *Miller* v. *California,* 413 U.S. 15 (1973) concede retains a degree of uncertainty. *See* Lockhart, *Escape From the Chill of Uncertainty: Explicit Sex and the First Amendment,* 9 Ga. L. Rev. 533, 558-561 (1975).[4]

Still, various members of this Court and of other courts have convincingly demonstrated that even civil injunctive procedures complying fully with the requirements of *Freedman* and directed solely against particular named items alleged to be obscene pose grave dangers to First Amendment values. In the first place, the employment of a civil injunctive proceeding by a state as a means of controlling obscenity, rather than a criminal prosecution, enables the state to relieve itself of the burden of proving to a jury, representing a cross-section of the community, the obscenity of the material in question beyond a reasonable doubt. Instead, the state may obtain the drastic remedy of injunction against the distribution of publications or films by merely proving to a single judge by a preponderance of the evidence that the items in question are obscene. Thus, a

[4]Article 4667(a)(3) of the Texas Revised Civil Statutes does not even have the saving grace of certainty, for an injunction entered pursuant to that statute is directed not just against named items found to be obscene but is directed against all unnamed and unidentified materials, not before the court, which could be found obscene in the future.

judge who finds that the state has met this lesser burden of proof has the power to deprive the members of his community of the right to read or view publications or films by enjoining their distribution. Given the fact that constitutionally protected literature is ". . .often separated from obscenity by a dim and uncertain line,"[3] lessening the state's burden of proof on the issue of obscenity increases the margin of error inherent in all factfinding procedures to such a degree that erroneous suppression of constitutionally protected materials is inevitable. *See* the concurring opinion of Justice Brennan, in which Justices Stewart and Marshall joined, in *McKinney* v. *Alabama, supra,* at 424 U.S. 683-685.

Moreover, the use of a lesser burden of proof increases the hazards of self-censorship by those who distribute literature or films dealing with the subject of sex.

> "The inevitable tendency of the preponderance-of-the-evidence standard—by forcing persons dealing in marginal material to make hard judgments as to whether such material is obscene in order to avoid civil sanctions—would be to limit the volume of at least the marginal material a bookkseller could permissibly handle, and thus 'restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.' *Smith* v. *California,* 361 U.S. 147, 154 (1959)." *McKinney* v. *Alabama, supra,* at 424 U.S. 684 (Brennan, J., concurring).

A second danger posed to First Amendment rights by the state's use of a civil injunctive procedure as opposed to a criminal prosecution in the obscenity area is that the civil in-

[3] *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 66 (1963).

junctive procedure allows the state to bypass a jury determination on the issue of obscenity. Central to the test of obscenity promulgated by this Court in *Miller* v. *California,* 413 U.S. 15 (1973) is whether the average person, *applying contemporary community standards,* would find that the expression in question appeals to the prurient interest and depicts or describes sexual conduct in a manner which is patently offensive. *See also Smith* v. *United States,* 431 U.S. 291, 301 (1977). If this test is to be properly applied, ". . .it seems clear that a jury, as a microcosm of the community, is the only 'trier of fact' fit to conduct the inquiry. . . ." *People ex rel. Busch* v. *Projection Room Theater,* 550 P. 2d 600, 619 (Cal. Supreme Court 1976) (Tobriner, J., dissenting).

In a civil injunctive proceeding, however, ordinarily no jury is impanelled to determine whether a work is obscene under contemporary community standards. Rather, ". . .that crucial determination—upon which the censorship of a book, a magazine, a play or a motion picture turns—is left instead to a single judicial officer." Id., at 550 P. 2d 619. Thus, the effect of the use by a state of a civil injunctive procedure in an effort to rid the community of obscene works is to ". . .reduce the adult population. . .to reading only those books that do not offend the sensibilities of the most 'sensitive' trial judge in their community."[4] *Id.,* at 550 P. 2d 620. *Cf. Butler* v. *Michigan,* 352 U.S. 380 (1957). *See also McKinney* v. *Alabama, supra,* at 424 U.S. 687-689 (Brennan, J., concurring); *Kingsley Books, Inc.* v. *Brown, supra,* at 354 U.S. 448 (Brennan, J., dissenting).

[4] An additional problem with civil injunctive proceedings in the area of obscenity arises out of the nature of the remedy itself. An injunction by definition *permanently* removes the particular items found to be offensive from public circulation. Community standards do not remain constant, however, but by their very nature continue to evolve. If, at some point, community standards would no longer be offended

Although the use of civil injunctions to suppress obscene materials poses dangers to the unobstructed circulation of constitutionally protected works—even when the requirements of *Freedman* are met—this Court, as already noted, has not deemed it constitutionally necessary to withhold completely from the states the power *ever* to employ such means in their efforts to control the distribution of obscenity. *Times Film Corp.* v. *City of Chicago,* 365 U.S. 43 (1961). A careful balancing of the competing interests involved has led the Court to conclude that First Amendment values can be preserved adequately by placing substantial limitations upon the use of the civil injunctive remedy in obscenity cases and by insisting upon faithful adherence to the procedural safeguards outlined in *Freedman* v. *Maryland, supra.*

The Texas procedure at issue in the present case drastically transgresses the limitations placed upon the power of the states by this Court's prior decisions. As interpreted by the state courts, Article 4667(a)(3) of the Texas Revised Civil Statutes authorizes the court, upon a finding that the defendant has circulated an obscene item, to enter an order permanently enjoining the defendant from distributing the work adjudicated obscene *and from distributing any and all other books, magazines and films which are obscene under Texas law.* The only condition attached to the exercise of this authority by the Texas trial courts is that the statutory definition of obscenity in force in Texas must be set forth as part of the restraining order. *Richards* v. *State,* 497 S.W. 2d 770 (Tex. Civ. App. - Beaumont, 1973); *Locke* v. *State,* 516 S.W. 2d 949 (Tex. Civ. App. - Texarkana, 1974).

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by the enjoined publications, then the continuing effect of the injunction would be to deny the public access to constitutionally protected materials. Moreover, an injunction prevents the materials in question from ever exerting an influence on community standards. *See McKinney* v. *Alabama, supra,* at 424 U.S. 685, n. 4 (Brennan, J., concurring).

Thus, Article 4667(a)(3) authorizes as injunction against the exhibition and sale of unnamed films and publications which have never been adjudicated obscene. It authorizes the imposition of an injunction against the circulation of films and publications not yet created or published. And it imposes upon the distributor of materials presumptively protected by the First Amendment the duty to inspect all books, magazines and films he intends to distribute, and the burden to remove from his bookshelves and theater screens, in advance of any judicial determination of obscenity, all works which *could* ultimately be found obscene. If he does not, and he circulates an item which the court sitting without a jury, finds to be obscene, he is guilty of criminal contempt and may be fined $500.00 and sentenced to jail for six months without the benefit of the jury trial to which he would be entitled were he charged with violation of the Texas criminal law which makes it a misdemeanor to distribute obscene material.[7] As the court below correctly observed, quoting Chief Justice Hughes' opinion in *Near* v. *Minnesota,* 283 U.S. 697, 713 (1931), "[t]his is of the essence of censorship."

This Court has never sanctioned the kind of injunctive relief authorized by Article 4667(a)(3). Indeed, on the two occasions upon which the Court has approved of a state's use of a civil injunction in the area of obscenity, the Court took great care to

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[7] Article 1911(a), §2 of the Texas Revised Statutes authorizes the courts of the state of Texas to punish by a fine of $500.00 and a jail term of six months any person found to be in contempt of court. The Texas Supreme Court has held that the contemnor has no right to a jury trial. *Ex Parte Werblud,* 536 S.W. 2d 542 (Tex. Supreme Court 1976). On the other hand, a person charged under the Texas criminal statute making it a misdemeanor to distribute obscene matter (Tex. Penal Code §43.23) does have a right to a jury trial. *See* Article I, Sec. 10, Texas Constitution. *Franklin* v. *State, 576 S.W. 2d 621 (Tex. Court of Criminal App. En Banc 1978); Evert* v. *State,* 561 S.W. 2d 489 (Tex. Court of Crim. App. 1978); *Dexter* v. *State,* 544 S.W.2d 426 (Tex. Court of Crim. App. 1976).

point out that in each case the state withheld any restraint against materials which were not before the court and which, therefore, had not yet been adjudicated obscene. Thus, in *Kingsley Books* v. *Brown, supra,* at 354 U.S. 445, the Court, in noting the difference between the New York civil injunctive procedure at issue there and the Minnesota nuisance procedure condemned in *Near* v. *Minnesota, supra,* stated:

> ". . .Unlike *Near* §22-a is concerned solely with obscenity and, as authoritatively construed, *it studiously withholds restraint upon matters not already published and not yet found to be offensive."* (Emphasis added).

Similarly, in *Paris Adult Theatre I* v. *Slaton, supra,* at 413 U.S. 55, the Court, in commenting favorably upon the Georgia injunctive procedure at issue there, stated:

> "Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected."

By way of contrast, Article 4667(a)(3) of the Texas Revised Civil Statutes authorizes the state courts to paint with a broad brush by enjoining the distribution of publications and films not before the court. Upon a finding that the defendant has distributed an obscene item in the past, his future right to circulate publications and films presumptively protected by the First Amendment and not yet adjudicated obscene is severely curtailed. Article 4667(a)(3) authorizes precisely the kind of injunctive relief condemned by this Court as an impermissible prior restraint nearly forty years ago in *Near* v. *Minnesota,* 283 U.S. 697 (1931). Clearly, an injunction against the distribution of books, magazines and films prior to their creation and publication and prior to a judicial determination that they are not entitled to constitutional protection is in direct conflict with

the First Amendment. A multitude of courts have so held. *See, e.g., Ladoza Canning Corp.* v. *McKenzie,* 370 So. 2d 1137 (Fla. Supreme Court 1979); *People ex rel. Busch* v. *Projection Room Theater,* 550 P. 2d 600 (Cal. Supreme Court, 1976); *Ranck* v. *Bonal Enterprises, Inc.,* 359 A. 2d 748 (Pa. Supreme Court 1976); *State ex rel. Ewing* v. *Without a Stitch,* 37 Ohio St. 2d 95, 307 N.E. 2d 911 (Ohio Supreme Court 1974), *app. dismissed,* 421 U.S. 923 (1975); *State ex rel. Field* v. *Hess,* 540 P. 2d 1165 (Okla. Supreme Court 1975); *Parish of Jefferson* v. *Bayou Landing, Ltd.,* 350 S. 2d 158 (La. 1977); *News Mart, Inc.* v. *State ex rel. Webster,* 561 S.W. 2d 752 (Tenn. 1978); *Fehlhaber* v. *North Carolina,* 445 F. Supp. 130 (E.D.No. Carolina 1978); *New Riviera Arts Theatre* v. *State,* 412 S.W. 2d 890 (Tenn. Supreme Court 1967). Accordingly, Article 4667(a)(3) was properly declared unconstitutional by both courts below.

The dissenters in the court below argued, however, that an injunction against the distribution of unnamed obscene materials in the future is not significantly different from a criminal statute which proscribes the circulation of obscene items. In their view, if the states have the power to enact criminal laws providing for the punishment of those who circulate obscene films and publications, as this Court has held, then it necessarily follows that the states have the power to enact laws authorizing the issuance of injunctions to prevent the circulation of these same unidentified and unnamed obscene films and publications. The reasoning advanced in the dissenting opinion is fatally flawed, however, because it altogether fails to take into account the distinction, fundamental in our constitutional jurisprudence, between prior restraint and subsequent punishment. As the court noted in *Fehlhaber* v. *North Carolina,* 445 F. Supp. at 139 (E.D. No. Carolina 1978), the view advanced by the dissenters ". . .ignores basic principles rooted in our jurisprudence since Blackstone."

It is beyond dispute that ". . .it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication." *Near* v. *Minnesota,* 283 U.S. 697, 713 (1930); *Patterson* v. *Colorado ex rel. Attorney General,* 205 U.S. 454, 462 (1907); *see Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 556-557 (1976). Thus, ". . .while the government may be able subsequently to punish those who engage in unprotected speech, only in exceptional circumstances may the same speech. . .be enjoined before it occurs." *Fehlhaber* v. *North Carolina, supra,* at 445 F. Supp. 139. For this reason, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971).

Moreover, in giving effect to the First Amendment's primary aim, this Court has held that the constitution guarantees a broader degree of protection against prior restraint of speech than it affords against subsequent punishment for the same speech. As this Court stated in *Southeastern Promotions Ltd.* v. *Conrad, supra,* at 420 U.S. 558-559:

> "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958)."

A prior restraint on expression poses the greatest danger to First Amendment rights and is far more serious than subsequent punishment under the criminal laws.

> ". . .prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> "A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n* v. *Stuart, supra,* at 427 U.S. 559 (footnote omitted).

The argument made by the dissenters below, that because distribution of obscene materials may constitutionally be punished as a crime it can also be validly enjoined, fails to take into account the First Amendment's abhorrence of prior restraint and preference for subsequent punishment as the means by which to check abuses of the liberties guaranteed by that Amendment. Their argument in support of the constitutionality of Article 4667(a)(3) also fails adequately to assess the "operation and effect of the statute in substance." *Near* v. *Minnesota, supra,* at 283 U.S. 713; *Kingsley Books* v. *Brown, supra,* at 354 U.S. 441.

The avowed purpose and unmistakeable effect of Article 4667(a)(3) is the imposition of a prior restraint on the distribution of books, magazines and films which have never been adjudicated obscene. A distributor of literature and films who is under a court order entered pursuant to Article 4667 (a) (3) is judicially restrained, under pain of contempt, from circulating *any* obscene publication or film as defined under Texas law. In order to comply with such a court order, he must carefully inspect all merchandise he intends to sell or exhibit, *prior to*

distribution and exhibition, and remove from the marketplace any material which could be found obscene under the definition set forth in the court's order. Thus, where *Freedman* v. *Maryland, supra,* expressly imposes upon the government the burden of proving that a publication or film ought to be censored as obscene, an Article 4667 (a) (3) injunction imposes the burden of censorship upon the distributor. A failure on the defendant's part to take affirmative steps to remove potentially offending materials from his bookshelves and theater screens can trigger a contempt of court citation which will be heard by the very judge whose order was flouted, sitting without a jury, and which can result in a $500.00 fine and imprisonment for six months.

The operation and effect of an Article 4667 (a) (3) injunction is, therefore, to cause the defendant to remove from the public domain films and publications in advance of any judicial determination of obscenity. And the coercive nature of the injunction will lead the defendant to steer far wide of the danger zone by removing from his inventory all borderline material. This will inevitably result in denying the public access to constitutionally protected materials.

Moreover, an Article 4667 (a) (3) injunction operates to impose absolute liability for the sale or exhibition of an obscene item. The defendant is guilty of criminal contempt if his inventory includes a single obscene item, irrespective of whether he had the slightest idea of the nature of that item.

In *Smith* v. *California,* 367 U.S. 147 (1959), this Court held unconstitutional under the First Amendment a criminal ordinance which dispensed with any element of *scienter* and imposed strict criminal liability on a bookseller who carried an obscene item. At 361 U.S. 151, the Court stated its reasoning as follows:

> "By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."

An Article 4667(a)(3) injunction operates in precisely the same manner. By restraining the defendant from exhibiting any obscene item, irrespective of whether he knows the nature of the material, an Article 4667(a)(3) injunction requires the defendant to limit his stock to those items which he has inspected. Since he will be unable to familiarize himself with all books, magazines and films available for distribution by him, the injunction operates to restrict "the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Smith* v. *California, supra,* at 361 U.S. 154. The defendant's self-censorship, compelled by the injunction, is "a censorship affecting the whole public. . .Through it, the distribution of all books, both obscene and not obscene, [is] impeded." *Id.*, at 361 U.S. 154. The kind of injunction authorized by Article 4667(a)(3) is, accordingly, clearly unconstitutional under *Smith* v. *California, supra.*

Both the district court and the court below correctly determined that Article 4667(a)(3) is unconstitutional under the First and Fourteenth Amendments. Their decisions should, accordingly, be affirmed by this Court.

2. The Texas Nuisance Statute [Article 4667(a)(3) Vernon's Texas Civil Statutes] Which Authorizes An Injunction Against Any Premises, Place Or Building For The Commercial Manufacturing, Distribution Or Exhibition Of Obscene Materials is Unconstitutional As A Prior Restraint Under The First And Fourteenth Amendments Because Of Procedural Deficiencies.

This Court has approved a limited injunction procedure against the publication of a particular book judged to be obscene. *Kingsley Books Inc.* v. *Brown,* 354 U.S. 437, 77 S.Ct. 1325. This has been called a model of an injunctive procedure designed to prevent the sale of obscene books. *Freedman* v. *Maryland,* 380 U.S. 51 at 60, 85 S.Ct. 734 at 740. *Blount* v. *Rizzi,* 400 U.S. 410, 91 S.Ct. 423 at 430. See also, *Paris Adult Theatre* v. *Slaton,* 413 U.S. 48, 93 S.Ct. 2628 at 2634.

The New York procedure approved in *Kingsley Books* v. *Brown, supra,* was a very limited exception, and the Court said the limitation of *Kingsley Books* is the exception and is to be closely confined so as to preclude what may fairly be deemed licensing or censorship. 354 U.S. at 442, 77 S.Ct. at 1328.

Justice Rehnquest speaking for the Court in *McKinney* v. *Alabama,* 424 U.S. 669, 96 S.Ct. 1189 says adequate procedures are required even when dealing with "obscene" material not protected by the First Amendment as follows:

> "While there can be no doubt under our cases that obscene materials are beyond the protection of the First Amendment, . . .those decisions have also consistently recognized that the procedures by which a State ascertains whether certain materials are obscene must be ones which ensure 'the necessary sensitivity to freedom of expression.' "
>
> 96 S.Ct. at 1193

Justice Brennan in his concurring opinion in *Nebraska Press Association et al* v. *Stuart et al,* 427 U.S. 539, also says the Court has determined that even in those exceptions to the First Amendment "adequate and timely procedures are mandated to protect against any restraint of speech that does come within the ambit of the First Amendment." *Nebraska Press Association, et al.* v. *Stuart, et al.,* 427 U.S. 539, 96 S.Ct. 2791 at 2817. He summarized a number of the cases on free speech in discussing the issue in *Nebraska Press Association.* He said it has been

generally, if not universally considered that it is the chief purpose of the First Amendment's guarantee to prevent previous restraints upon publications. Prior restraints are the essence of censorship and our distaste for censorship is deeply written in our law. The First Amendment thus affords greater protection against prior restraints than it does against subsequent punishment for a particular speech because a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risk of free-wheeling censorship is formidable.

This Court has determined, as shown by the injunctive procedures approved by it, that the First Amendment protection, even as to prior restraint, is not absolutely unlimited and among the exceptions is obscene publications. The exceptions have been interpreted as situations in which the speech involved is not encompassed within the meaning of the First Amendment but as previously stated adequate and timely procedures are mandated to protect against any restraint of speech that does come within the ambit of the First Amendment. Justice Brennan said the Nebraska Supreme Court could not use a balancing approach, in holding the presumption must be overcome in light of some perceived justification. The Nebraska Supreme Court misinterpreted this Court's language that a heavy burden is required before there should be the imposition of such a restraint since that means, in the words of this Court:

> "[T]hat, as a matter of procedural safeguards and burden of proof, prior restraints even within a recognized exception to the rule against prior restraints will be extremely difficult to justify; but as an initial matter, the purpose for which a prior restraint is sought to be imposed 'must fit within one of the narrowly defined exceptions to the prohibition against prior restraints.' "
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> 427 U.S. at 594, 96 S.Ct. at 2819.

The Court, speaking through Justice Burger in *Nebraska Press Association, supra,* said:

> "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."
>
> 427 U.S. at 560, 96 S.Ct. at 2803.

Labeling the statute as a prior restraint does not end the inquiry. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 547, 95 S.Ct. 1239. The Court has held that prior restraints are not unconstitutional per se but has stated there must be a pragmatic assessment of the operation in the particular circumstances. *Kingsley Books* v. *Brown,* 354 U.S. at 442, 77 S.Ct. at 1328. The Court has said that First Amendment protection does not include complete and absolute freedom to exhibit at least once in every kind of motion picture since prior submissions under a proper censorship law may be required. In fact in *Kingsley Books, supra,* the Court points out that while the law moves after publication the book need not, in either case, have yet passed into the hands of the public and in the *Alberts* record, referred to in *Kingsley*, it did not show that the matter found to be obscene had reached the public at the time that the criminal charge of keeping such matter for sale had been lodged. See *Kingsley Books* v. *Brown,* 354 U.S. at 442, 77 S.Ct. at 1328.

In *Southeastern Promotions, Ltd., supra,* the Court pointed out the presumption against prior restraints is heavier and the degree of protection broader than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: A free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. This Court states in *Southeastern Promotions, Ltd.,* as follows:

> "In order to be held lawful, respondents action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduced the danger of suppressing constitutionally protected speech.
>
> . . .
>
> "The settle rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' "
>
> 420 U.S. at 561, 95 S.Ct. at 1247.

In *Kingsley Books* v. *Brown, supra,* the New York statute authorized the chief executive or legal officer of a municipality to invoke a "limited injunctive remedy under closely defined procedural safeguards against the sale and distribution of written or printed matter found after due trial to be obscene." 354 U.S. at 437, 77 S.Ct. at 1326. The New York judge, the Court states, refused to enjoin the sale and distribution of *later issues* on the ground that to rule *against a volume not offered in evidence* would impose an unreasonable prior restraint upon freedom of the press. See, 354 U.S. at 439, 77 S.Ct. at 1327. "The New York injunctive procedure there sustained does not afford *ex parte* relief but postpones all injunctive relief until 'both sides have had an opportunity to be heard'. *Quantity of Books* v. *Kansas,* 378 U.S. 205 at 210, 84 S.Ct. 1723 at 1725."

In *Freeman* v. *Maryland, supra.* the Court summarized the New York injunctive procedure which was approved as follows:

> "That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down

his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected."

380 U.S. at 60, 85 S.Ct. at 740.

In making the pragmatic assessment and in reviewing the procedural safeguards, the statutes and civil procedure of the State of Texas must be reviewed. The conclusion after that review is that there are *no procedural safeguards* as required when dealing with material which may be presumed to be protected by the First Amendment Because of the deficiencies in, or lack of such procedural safeguards, the Texas Nuisance Statute [Art. 4667(a)(3)] is unconstitutional as a prior restraint under the First and Fourteenth Amendments.

A. Neither The Statute Nor The Texas Rules Of Civil Procedure Have Any Built-In Procedural Safeguards Which Are Necessary When Regulating Materials Presumed Protected By The First Amendment.

In reviewing the federal statute on postal regulations the Court held such regulations unconstitutional because they:

"[A]re procedures designed to deny use of the mails to commercial distribution of obscene literature, those procedures violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression. For government is not free to adopt whatever procedures it pleases for dealing with obscenity. .without regard to the possible consequences for constitutionally protective speech."

Blount v. ***Rizzi,*** 91 S.Ct. at 428.

The Court was able to construe the federal statute in *U.S.* v. *Thirty-Seven (37) Photographs,* 402 U.S. 363, 91 S.Ct. 1400, so as to require a time limit for the bringing of any action and for a final judicial determination as applicable to importers and further stated that limits might vary in different context such as a claim by a state censor that a movie was obscene.

The State of Texas once had a injunctive procedure with built-in procedural safeguards or time limits which permitted no restraining or injunction to be issued except upon notice and the person was entitled to a trial within one (1) day after joinder of issue with a decision to be rendered within two (2) days of the conclusion of the trial. *Moore* v. *State of Texas,* 470 S.W.2d, at 394 fn. 4.

Article 4667 permitting the enjoining of any public nuisance for the commercial manufacture, distribution or exhibition of obscene material has no procedural safeguards and the Texas Rules of Civil Procedure do not provide any built-in safeguards nor has there been any authoritative construction by the Texas courts establishing required procedural safeguards. As stated in *Southeastern Promotions, Ltd.* v. *Conrad,* 95 S.Ct. at 1244, "Invariably, the court has felt obligated to condemn systems in which the excercise of such authority was not bounded by a precise and clear standards."

Appellee, King Arts Theatre takes exception with the statements both in the Jurisdictional Statement and the Brief for the Appellee that procedural safeguards are present in the Texas injunctive process. The State of Texas contends that the language of an injunction and the procedures required for approving violations of the injunction are such that a prior restraint is permissible. The State of Texas notes in its Brief that the District Court Judge in *State* v. *Stambaugh,* attached as Appendix 3 to the Jurisdictional Statement, illustrates the kind of injunction entered pursuant to Article 4667 (a) (3). This injunction indicates the judge's refusal to enter a temporary restrain-

ing order without notice and hearing in an obscenity-oriented injunction proceeding. The State of Texas contends that such an injunction is drawn in accordance with the Texas law in this sensitive area of prior restraint which in turn follows the law of this Court in determining the validity of such restraint citing three Texas cases. None of these cases can be relied upon as establishing any authoritative construction of procedural safeguards. In *Moore* v. *State,* 470 S.W.2d, 391 and *Richards* v.*State,* 497 S.W.2d 770, the Texas court was operating under the previous Texas injunctive procedure Article 527, Section 13. See, *Richards* v. *State,* 470 S.W.2d at 394 fn. 4. Article 527 of the Texas Code provided for no injunction except upon notice together with a trial within one day after an answer and a decision within two days after conclusion of the trial. These procedural safeguards were repealed. In *Locke* v. *State,* 516 S.W.2d, 949, the Texas court made no decision on any procedural safeguards. In *Locke*, the court stated that no *ex parte* restraining order or writ was issued and the temporary injunction was issued after notice in a form *agreed to* by both *Locke* and the State. There is nothing in this decision requiring a prompt trial upon the merits or a prompt judicial decision. In *Locke* procedural safeguards was referred to by the Court stating that the order restrained only the exhibition of films depicting specific activities in a certain manner so as to be subsequent punishment and not illegal prior-restraint.

Contrary to this Court's holding in *Freedman* v. *Maryland, supra,* the Texas court approved an order that contained an agreed procedure which required *Locke,* the exhibitor, to secure a judicial determination of the protected film or nonprotected status of a film prior to exhibition or test the matter by contempt. Contempt would have certainly been criminal contempt. This placed the burden upon *Locke* to present the matter to the court contrary to the rule that the censor or the state official should present the matter to a court. The theatre owner or exhibitor could test the character of the film in a contempt hearing

and suffer punishment for his past act even though the film had not been determined obscene before the contempt charge was brought.

It is difficult to understand the real nature of the injunction in *State* v. *Stambaugh* quoted in the brief for the State of Texas and in Appendix 3 in the Jurisdictional Statement. The *Stambaugh* injunction was a *permanent* injunction. The court not only enjoined films which exhibited certain conduct as defined in several Texas statutes but enjoined:

> "[A]ny other motion picture, magazine or other materials which contained representation or descriptions of ultimate sex acts, normal or perverted, actual or simulated, or which contained representations or descriptions of masturbation, excretory function and the lewd exhibition of the genitals; all of the aforesaid materials, including those introduced, those that portray deviate sexual intercourse, sexual intercourse, and beastiality and materials of the type immediately as described above."

Such an injunction is extremely broad.

As to procedure, the Texas District Court in the *Stambaugh* case does not indicate whether there will be any contempt charge or not since it states that "in view of the serious constitutional questions that always arise when prior restraints are imposed. . .this court will not entertain in the future in this case or against this defendant any applications for temporary restraining orders without notice to and the opportunity to be heard by the persons sought to be enjoined should the state again seek to proceed under Article 4667." It is unclear therefore, whether the court is requiring for each and every book in the future there must be a hearing to determine obscenity before an injunction could apply or that it is merely stating that for other locations this defendant might occupy, he might require notice.

In any case this injunction is certainly not comparable to the injunction issued several years later in 1978, at the request of Henry Wade, the District Attorney of Dallas County, and Lee Holt, the City Attorney of Dallas. In *Wade* v. *Haddad,* No. 78-2055-C cited in the Appendix and made a part of this Record (A 132) a *temporary* injunction was granted upon notice and there are no procedural safeguards built into that injunction nor into the Texas rules of Civil Procedure for any hearing upon the merits. That temporary injunction was *issued* "pending final hearing and determination of this cause restraining and enjoining defendants . . .from commercially exhibiting . . .any motion picture. . ." which had certain specified conduct. This 1978 injunction is certainly not illustrative of what the State of Texas would assert is a cumbersome weapon. *This is prior restraint on any future publication of unnamed motion pictures, books or magazines without any procedural safeguards either by statute, rules of civil procedure or authoritative judicial construction.*

Without built-in procedural safeguards the Texas public nuisance statute to enjoin the commercial exhibition of obscenity is constitutionally deficient.

B. The State Can Obtain An Ex Parte Temporary Restraining Order For A Ten-Day Period.

The Texas Rules of Civil Procedure, Rule 680, provide that a temporary restraining order can be obtained *ex parte* which shall expire by its terms in ten (10) days. In *Locke* v. *State, supra,* no *ex parte* restraining order was issued, but this is not an authoritative determination that none *could* be *issued*. There is, therefore, no built-in procedure of safeguard which would prevent the enjoining without notice or hearing of the exhibition of a motion picture or the sale or distribution of book, magazine or newspaper under a temporary restraining order. A temporary injunction hearing is available upon request at the earliest practicable date but the prior restraint by injunction without notice is in effect.

C. A Temporary Injunction May Be Granted, Not Only Against Material In Existence, But Future Unnamed Motion Pictures On The Basis Of "Probable Right" To The Relief Sought And That The Evidence "Tends" To Support The Cause Of Action.

The State of Texas asserts that the Fifth Circuit's opinion is in error that in Texas a court granting a temporary injunction merely determines probable right and probable injury. The State of Texas contends that *Moore v. Texas, supra,* and *Locke v. Texas, supra,* examined the validity of the temporary injunctions on appeal in terms of obscenity standards and not merely in the framework of "probable right" and "probable injury."

In *Moore* v. *Texas, supra,* which considered an injunction against obscene material, the court said:

> "We are guided by certain well established rules in the character of appellate review requiring in passing upon the granting of a temporary injunction. To warrant the issuance of a writ of temporary injunction, the applicant need only show a probable right and a probable injury; he is not required to establish that he will finally prevail in the litigation. . .it is also well settled that our review is limited to the narrow question as to whether the action of the trial court in granting or denying a temporary injunction constitutes a clear abuse of the discretion."
>
> 470 S.W.2d at 392-93.

The Appellate Court in *Moore* stated that the trial court did not abuse its discretion in granting that part of the temporary injunction referring to the specific books and magazines, or enjoining the showing of certain identified films. On the other hand, the court found there was a violation of the Texas Rules of Civil Procedure in the mandatory provisions of Rule 683 in that it did not sufficiently appraise the appellants of the acts they are enjoined or restrained from doing by enjoining similar

material. The injunction generally prohibited the defendants from violating a penal statute without clear, precise or definite guidelines and the injunction against showing *similar items* which were obscene was reversed with the court saying there was no need to rule upon the constitutional issues of prior restraint. In *Locke* v.*State* the court did not change the rule of probable right or probable injury for the granting of a temporary injunction but did state that an independent determination of obscenity would have to be made by the reviewing court. The opinion of the Fifth Circuit Court of Appeals is correct in that under Texas procedure obscenity cases are treated no differently than any other civil case. If the theatre operator is unable to convince an appellate court that the trial court abused its discretion, the injunctive order remains in effect. Such an order is based upon probable right and probable injury and does not comply with the procedures required by this Court that there be notice and an adversary hearing insuring the necessary sensitivity to freedom of expression. The procedure requires a judicial determination to impose a valid final restraint. *Freedman* v. *Maryland, supra; Kingsley Books* v. *Brown, supra; Quantity of Books* v. *Kansas, supra; Blount* v. *Rizzi, supra; Paris Adult Theatre* v. *Slaton, supra.*

D. A Temporary Injunction Does Not Constitute A Ruling On The Merits Or Final Ajudication Of Obscenity *Vel Non* Of Films In Existence, Nor Ajudication That All Such Films With Similar Conduct Are Obscene.

As stated in the previous section, a temporary injunction is not a final ruling on the merits.

A temporary injunction is just that, temporary. There is no provision in the Texas procedure nor any authoritative construction that, as required by *Kingsley Books* v. *Brown, Freedman* v. *Maryland* and others, there must be a trial upon the merits and that any temporary injunction is only to maintain the status quo for the shortest period possible. As stated by the

Fifth Circuit, since the burden at that stage is probable right and probable injury, a party is not entitled to a full blown determination of obscenity and the hearing on a temporary injunction is substantially different from that afforded at a final hearing on the merits. *Freedman* v. *Maryland, supra,* requires any restraint imposed in advance of a final judicial determination on the merits must similarily be limited to preservation of the status quo for the shortest fixed period compatable with sound judicial resolution. 85 S.Ct. at 739. The temporary injunction under the Texas procedures has no procedural safeguards built-in and renders a statute unconstitutional.

E. Any Appeal Of A Temporary Injunction Does Not Go The Merits Of Any Past Of Future Obscene Material But Whether The Trial Court Abused Its Discretion In Granting The Temporary Injunction.

The Fifth Circuit reviewed the rules in Texas on an appeal from a temporary injunction. In *Locke* v. *State, supra,* the court was determining constitutional challenges. In *Moore* v. *State,* 470 S.W.2d 391, the Texas court said it was well settled that its review was limited to the narrow question of whether the trial court's action in granting or denying the temporary injunction constitutes a clear abuse of discretion.

Procedural safeguards, however, are not normally keyed to what grounds may be considered on an appeal of a temporary injunction. The purpose of procedural safeguards is to *limit the status quo or temporary injunction* to the shortest time permissible with judicial discretion. Since Texas has no method for establishing a trial immediately upon the merits, the consideration of what may be considered on an appeal from a temporary injunction is further evidence of the lack of procedural safeguards requiring the statute to be held unconstitutional for such deficiencies.

F. There Is No Provision For Prompt Final Hearing On the Merits.

G. There Is No Provision For a Prompt Judicial Determination.

Procedural requirements for a prompt final hearing on the merits and a prompt judicial determination are closely associated in the cases. Each is a necessary element. There is nothing in the Texas statute nor in the Texas civil procedure which would treat an obscenity case any differently than any other civil case as was pointed out by the Fifth Circuit. *See,* 587 Fed.2d at 171. The quotation from *Grove Press Inc. v. Philadelphia,* 418 Fed.2d 82, is very appropriate in that a preliminary or temporary injunction may last for days, even months, before a judicial decision on the merits.

Kingsley Books Inc. v. Brown, supra, has been cited many times as the model. This New York statute required a hearing on the merits within one day after answer and a decision within two days of the conclusion of the trial. While the Court might not consider this as binding in all other situations, it is a clear indication that there must be a provision for a prompt final hearing and a prompt judicial decision.

The Court in *Freedman v. Maryland, supra,* in discussing a censorship statue and the necessity for the censor going to court also determined that the procedure must assure a final judicial decision as well as the shortest fixed period compatable with sound judicial resolution for a determination on the merits. *See,* 85 S.Ct. at 739. *Marcus v. Search Warrant of Property,* 367 U.S. 717, 81 S.Ct. 1708, contrasted the Missouri statutory scheme with the New York statute in *Kingsley Books.* The New York statute required a decision on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction in contrast to the Missouri scheme which had no time

limitation and was held unconstitutional. This Court further declared in *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, that it has tolerated a system of prior restraint "only where it operated under judicial superintendants and assured an almost immediate judicial determination of the validity of the restraint." 83 S.Ct. at 639.

In *Teitel Film Corporation* v. *Cusack,* 390 U.S. 139, 88 S.Ct., 754, an Illinois censorship law was held unconstitutional for among other reasons that the procedure did not assure a prompt judicial decision. Likewise this court in *Blount* v. *Rizzi,* not only placed the burden of initiating judicial proceedings upon the government but required a prompt judicial review; that is, a final determination on the merits within a specified brief period. In *Quantity of Books* v. *Kansas,* 378 U.S. 205, 84 S.Ct. 1723, the Court said that the teaching of *Kingsley* v. *Brown* involved the need of procedures and commented "the New York injunctive procedure there sustained does not afford *ex parte* relief but postpones all injunctive relief until 'both sides have had an opportunity to be heard.' " 84 S.Ct. at 1725.

Finally this Court in *Southeastern Promotions Ltd.* v. *Conrad,* 420 U.S. 546, 95 S.Ct. 1239 indicated that while *Freedman* v. *Maryland* was a administrative censorship system, this Court has applied *Freedman* to the judicial procedures by which federal custom agents seized imported materials and to the procedures by which postal officials restrict the use of mail. The court determined that there was a need for a prompt decision after any temporary injunction such as was required in *Kingsley Books* v. *Brown* and a prompt judicial determination. The court said:

> "Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured."
>
> 95 S.Ct. at 1247.

The reasoning of these cases is likewise applicable to the need for procedural safeguards built into the Texas statute. There is nothing to prevent an obscenity case from being treated just as an ordinary civil case. Not only may the temporary injunction be granted but there is no provision that after the injunction has been granted there will be a prompt final hearing on the merits and a provision requiring the court to render a prompt decision. Lack of these procedural safeguards requires the Court to affirm the Fifth Circuit that the Texas Statute 4667(a)(3) is unconstitutional.

H. Past Exhibition or Distribution As Well As Continued Exhibition or Distribution of Any Unidentified Materials Presumed Protected By The First Amendments Subjects The Person To a Criminal Contempt Charge Even Though The Injunction May Be Erroneous But Not Void, and the Unnamed Book, Magazine or Film Has Not Been Determined Obscene Before Issuance of the Contempt Charge.

The State of Texas in its brief repeats an extraordinary statement made in the Jurisdictional Statement. The State of Texas asserts that "each alleged violation of an injunction must be shown by proof by the complainant; and the violator need only purge himself of contempt by agreeing not to exhibit or sell the offending material."

There is nothing in the statute or the Texas Rules of Civil Procedure or in any general statute defining contempt (Art. 1911 A) which justifies such an assertion. It is contrary to decisions of the Texas court construing the remedy of contempt. The State of Texas quotes Rule 692 of the Texas Rules of Civil Procedure on disobedience of an injunction but leaves out the following phrase of the Rule:

> "[d]irected to the sheriff or any constable of any county, and requiring such officer to arrest the person bearing name if found within his county and have him before the court or judge at the time and place named in such writ; "

The State of Texas would appear to assert that a petition for contempt would always be by a show cause order, not by attachment and arrest, and that there would be no punishment for past exhibition.

The State of Texas would assume that upon issuance of a citation that a certain book magazine or motion picture was in violation of the injunction, there would merely be a determination of whether or not the material was obscene and thereafter the theater operator of bookstore operator, by promising not to show this material or sell the book or magazine, would be purged of any contempt and not suffer any punishment either under a civil contempt or a criminal contempt. A better procedure is to file for an injunction under a procedure like that approved in *Kingsley Books* rather than a blanket injunction for future unidentified material and assume such a judicial attitude exists for any alleged contempt charge.

If any distributor or exhibitor of materials subsequently found obscene could be assured by judicial interpretation or by a plainly written statute of the State of Texas that a citation for contempt would be filed only by state authorities and not by private individuals and that the only thing necessary to purge the exhibitor of contempt, if the material were then found obscene after notice and adversary hearing, would be to agree not to exhibit or sell the offending material, the statute would be similar to an injunction against identified existing materials provided in *Kingsley Books* v. *Brown*. The only objections would be the lack of procedural safeguards.

There can, however, be no *promise by the State Attorney General of Texas* which would be binding upon all of its courts, both district and appellant. This would require what the Appellate Court in Texas in *Richards* v. *State, supra,* has sought to eliminate; that is, the necessity for a filing of a complaint each time the state sought to enjoin a particular magazine, motion picture or book. A new statute outlining such a promise with procedural safeguards inserted would have to be passed.

King Arts Theatre, or any motion picture exhibitor or bookstore operator faced with an injunction which enjoined showing a future unnamed motion picutre, book or magazine which has certain specified conduct and is obscene under the tests in the Texas statute, faces criminal contempt charges with a maximum fine of $500.00 and imprisonment for six months.

The motion picture theatre operator cannot purge himself of contempt by stopping continued exhibition. The film has been shown to customers and the past exhibition cannot be erased. Likewise, a book which has been sold to a customer cannot be returned so that the bookstore could purge itself of contempt by attempting to recover the book from an unknown customer. It has been sold. A petition for contempt would be *criminal contempt* or at least *combined civil and criminal* contempt in that the Court could punish for past conduct as well as require a future promise of obedience.

Texas follows the accepted definition of civil and criminal contempt. In *Ex parte Werblud,* 536 S.W.2d 542 (1976), the Supreme Court of Texas discussed criminal and civil contempt as follows:

> "The purpose of civil contempt is remedial and coercive in nature. A judgement of civil contempt exerts the judicial authority of the court to persuade the contemptor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional upon obedience and therefore the civil contemptor 'carries the keys of (his) prison in (his) own pocket'. . .in other words, it is civil contempt when one-'~~may procure~~ his release by compliance with the provisions of the order of the court' . . .this is the settled rule in Texas.
>
> "Criminal contempt on the other hand is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemptor is being punished for some completed act which affronted the dignity and authority of the court."
>
> 536 S.W.2d at 545.

The Texas court in *Ex parte Hosken,* 480 S.W.2d 18, stated:

> "Ordinarily, the punishment is fixed and definite and no subsequent voluntary compliance on the part of the defendant can enable him to avoid punishment for his *past* acts.
>
> "In some instances, the proceeding partakes of the nature of both. Thus, when the court imposes fine or imprisonment for violation of a child support order, it is punishing for yesterday's contemptuous conduct. This is essentially criminal. When it adds the coercive sanction of imprisonment until the order is complied with, it is announcing the consequences of tomorrow's contemptuous conduct. In the latter instance, the contempt is civil in nature." (Emphasis supplied)
>
> 480 S.W.2d at 23.

Texas also recognizes the well-established rule that civil contempt or imprisonment cannot be specified when it is not within the power of the person to perform the act which alone will purge him of contempt. The court could not imprison the person for an indefinite term, which is permissible under the remedial part of civil contempt, but may only punish by criminal contempt. *See, Ex parte Dewees,* 210 S.W.2d 145.

Any citation for contempt would be criminal contempt or both criminal and civil contempt. The book would have been sold or offered for sale. The motion picture would have been shown. It is doubtful that a citation for contempt could always be issued before a motion picture was shown or before a book was sold. The Texas court would thus have both civil and criminal contempt. It would be authorized to punish up to the maximum amount of a $500.00 fine and six months in jail, without a jury trial, and without the usual benefits of any

criminal proceeding. It would further have the power of civil contempt to require the film not to be shown in the future. A promise not to show the film or the action of taking the film from the screen or taking the book from the bookstore would probably comply with the civil contempt. However, the past act would have been completed and criminal contempt would always be available since it would be impossible to erase the previous showing of the movie or to recover all copies of a book so'd to customers who might not voluntarily part with it.

Most importantly, there would have has been no determination *before* the *contempt charge* that the motion picture is obscene. The person could be charged and faced with imprisonment for contempt because of some past exhibition or distribution of an unidentified film, book or magazine, even though such unnamed book, magazine or film had not been determined obscene before the issuance of the contempt charge, thereby depriving the person of the procedural safeguards necessary before such an injunction would have been issued.

The decision of the Fifth Circuit Court of Appeals that Article 4667 (a) (3) is unconstitutional as lacking procedural safeguards should be affirmed.

3. Such a State Statute is Unconstitutional Under the First and Fourteenth Amendments Because it Authorizes the Entry of an Injunction Restraining the Exhibition of Unidentified Fims Under a Public Nuisance Doctrine and, Therefore, Authorizes the Imposition of Absolute Liability in the Form of Criminal Contempt for the Exhibition of an Obscene Film.

This Court has stated many times that any system of prior restraint comes to this Court bearing a heavy presumption against its constitutional validity. The presumption against prior restraints is heavier - and the degree of protection broader -than that against limits on expression imposed by criminal penalties. Behind the distinction is the theory deeply etched in our law: a free society prefers to punish the few who abuse

rights of speech after they break the law than to throttle them and all others beforehand. While there may be narrowly defined exceptions to the prohibitions against prior restraint, this Court has always determined that *only a judicial determination in an adversary proceeding insures the necessary sensitivity to protect freedom of expression.*

This Court has looked to the practical operation of a system. The Fifth Circuit Court of Appeals cited Judge Aldisert in *Grove Press, Inc.* v. *Philadelphia,* 418 F.2d 82. Judge Aldisert comments upon the doctrine of public nuisance and states:

> "What is encountered with the sprawling doctrine of public nuisance is an attempt to restrict First Amendment rights by means analogous to those under 'a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.' *Cantwell v. Connecticut,* 310 U.S. 296, 308, 60 S.Ct. 900, 905, 84 L.ED. 1213 (1940).
>
> "The common law of public nuisance may be a perfectly valid method by which to implement a state's police power in certain defined circumstances where, for example, it is used to restrain that which is prohibited by other constitutionally appropriate standards. It may not be used, however, both to define the standards of protected speech and to serve as a vehicle for its restraint.
>
> "Accordingly, we agree with the conclusion reached by the district court as to the invalidity of utilizing a theory of public nuisance alone to enjoin expression."
>
> 418 F.2d at 88.

Even though the California court held an injunction could only be against named films before the court, Justice Tobringer in his dissent in *People ex rel Busch* v. *Projection Room Theater,* 550 P.2d 600, stated:

"The sword of public nuisance is a blunt one, admirably designed to curb noxious odors or to quell riots, but ill suited to the delicate spear of the First Amendment where legal overkill is fatal."

550 P.2d 620.

The California Supreme Court in *People* v. *Projection Room, supra,* had determined that the nuisance statute declaring as a nuisance anything which is injurious to health or is indecent or offensive to the senses might be used to abate "particular books or films which have been adjudicated obscene during a fair and full adversary hearing, rather than against the premises in which the material is sold, exhibited or displayed." 550 P. 2d at 610. That same Court had said that an injunction "must be proper and suitable" to the facts of each case and that a proper and suitable injunction would be only an injunction of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing. See 550 P.2d at 609. The Court further stated that it emphasized the proceedings were only at the pleading stage and that the Complaint was sufficient to state a cause of action based upon a general nuisance theory. The provisions on closing a theater were held unconstitutional.

This Court in *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 95 S.Ct. 1239, in commenting on the perils of prior restraint by refusing to allow the performance of a play which would also be applicable to future unnamed and unidentified books, magazines or motion pictures stated:

"The perils of prior restraint are well illustrated by this case, where neither the board nor the lower courts could have known precisely the *extent of nudity or simulated sex* in the musical, or even that either would appear, before the play was actually performed."
(Emphasis supplied)

95 S.Ct. at 1248.

In Texas, as in California and generally, the legislature determines a definition of nuisance, but what constitutes a nuisance is a justiciable question. As stated in a recent opinion by Judge Taylor of the Northern District of Texas in *Ellwest Stereo Theaters, Inc., of Texas* v. *Byrd, et al.,* 472 F. Sup. 702:

"It is ancient law that public nuisances may be enjoined. But the Texas courts have held that legislative bodies may only define a nuisance, whether or not a particular use constitutes a nuisance is a justiciable question."

472 F.Sup. at 706.

Likewise, Justice Tobringer in *People ex rel Busch* v. *Projection Room Theater, supra,* called public nuisance a remedy designed for those rare cases where any delay would concretely imperil the public interst. He comments that if a city attorney can find a single judge who believes the material is obscene, he can permanently curtail the public's right to read books, magazines or view motion pictures. He further states that courts of equity enjoy no roving commission to define public nuisances; they may abate only such nuisances as the legislature declares. *See* 550 P.2d at 613.

The Texas court in *Richards* v. *State of Texas,* 497 S.W.2d 770, held that the state has the right to chart is own course and that equity should be "able to fashion the remedies necessary to the public welfare." *See* 497 S.W.2d at 780. The Texas court was unwilling to concede the State must bring suit each time nor to tie the hands of the Chancellor that he may not prohibit future conduct of the nature shown to have been done *solely in the pursuit of profit.* While the Court recognized the case was not free from doubt, it would allow an injunction against specified conduct in future films until overridden. The Texas Court in *Richards* also reached the conclusion that any film which protrayed sexual intercourse or the other items specified are, of course obscene, stating:

"However, it is obvious that films explicitly portraying sexual acts as described in Section (c) of the decree are obscene."

497 S.W.2d at 779.

The Texas court is clearly wrong. Sex and obscenity are not synonymous.

The use of public nuisance or injunctions in equity in a sensitive area such as First Amendment raises extreme practical problems. As stated by Justice Exum in his dissent in *State ex rel Andrews v. Chateau X, Inc.*, 250 S.E.2d 603 (N.C. 1979), injunction is totally antithetical to any notion of free speech because:

"Once the expression is made it is an accomplished fact upon which it is permissible for courts to act as in other criminal cases. If the expression be illegal, those responsible can be held accountable. This notion inheres elsewhere in the law in the familiar doctrine of admittedly uneven application that equity will not enjoin a proposed criminal act on the ground that there is a complete remedy at law if the act is committed."

250 S.E.2d at 620.

A general principle on the use of equity in criminal or immoral matters is stated at 27 Am.Jur.2d, Equity §56, p. 578, as follows;

"The general principle is well settled that equity has no jurisdiction in criminal or immoral matters which do not affect property. It is not the mission of equity to administer the criminal law or enforce morality or religion except where incidental to the enforcement of property rights."

Public nuisance statutes usually refer to property such as odors, use of property for the sale of intoxicating liquors, or as a house of prostitution or other matters in which there may be a crime involved, but equity is involved with the enforcement of a property right. Here the enjoining of the sale of future issues of unnamed publications is not for the benefit of some public property right or special injury to a person, but is used to enforce a criminal statute.

It is further clear that the use of an injunction against a future unnamed publication which may be held obscene in a contempt hearing is both *criminal contempt* and *civil contempt*. The offender may be punished for past acts which is subsequent punishment. He further may be enjoined from future exhibition which would be a civil contempt if the person refused to agree to obey the injunction, and in fact, could be kept in jail until the motion picture film, book or magazine were surrendered or had been taken from the bookstore or screen.

The offender is likewise not only subject to a contempt action, but may also be charged with the criminal offense of exhibition of the motion picture or distribution of the book or magazine. The offender would be served a show cause order for contempt, as well as being arrested for violation of the criminal law with various procedural problems, which may arise in trying to defend both actions at the same time.

The question raised is whether an injunction describing material in the abstract by use of the statutory definition of obscenity and certain specified conduct in its practical operation a prior restraint when applied to unidentified motion picture films, magazines or books acquired in the future by the distributor or exhibitor. The person is subject not only to criminal charges, but to contempt if they should violate the injunction by possessing any of these generically described items which might later be judicially determined in a contempt proceeding to fit within its proscription.

T. Emerson was quoted by Justice Brennan in his concurring opinion in *Nebraska Press Association* v. *Stuart, supra,* that a system of prior restraint is in many ways more inhibiting than a system of subsequent punishment. This was cited by Judge Fitzgerald in *Spokane Arcades, Inc.*, v. *Ray,* 449 F.Sup. 1145 (E.D. Wash. 1978), when Judge Fitzgerald held a statute attempting to apply public nuisance to motion pictures and books in Washington unconstitutional. Professor Emerson in that same article comments upon the use of injunctions and points out some of the practical problems of operation of an injunctive sytem and why such an injunctive system would be an impermissible and unconstitutional prior restraint.

Professor Emerson spoke of the statute in *Near* v. *Minnesota,* 283 U.S., 697, 51 S.Ct. 625 and said that on paper it was a system for subsequent punishment by contempt procedure:

> "But in practice, the system was bound to operate as a serious prior restraint. Punishment could be summarily dispensed by a single official, without jury trial or the other protections of criminal procedure, for infraction of a loose and illusive mandate. Under such circumstances, any publisher seeking to avoid prison, would, in sheer self-protection, have to clear in advance any doubtful matter with the official wielding such direct, immediate, and unimpeded power to censor. The judge, would, in effect, become a censor.
>
> "Thus, the Court made clear that it was not interpreting the concept of prior restraint on a narrow legalistic or historic basis. It was, as it said, testing the statute by its 'operation and effect'."
>
> *T. Emerson, The Doctrine of Prior Restraint,* p. 654.

Professor Emerson concludes in his Article as follows:

> "As to the judicial form of prior restraint, similar considerations apply. Where the injunction or other judicial process prohibits only certain kinds of communication, as in *Near* v. *Minnesota,* the judicial officer tends to be in the same position as an executive officer. Where the injunction prohibits all communication, the element of individual control is eliminated or minimized, but the restraint includes lawful as well as unlawful communication. In either case, the restraint is pervasive and should normally fall within the rule."

The use of public nuisance against unidentified future motion picture films, books, magazines and even newspapers is a prior restraint which does not meet constitutional standards which require at least a judicial determination and an adversary hearing before there could be a restraint.

A. There Can Be No Prior Restraint On Future Publication of an Obscene Expression in a Civil Proceeding Without Notice and Judicial Determination in an Adversary Hearing Before Suppression.

The Fifth Circuit Court of Appeals' reasoning in the majority opinion is sound that you cannot issue a blanket ban on the showing of films that have not been judicially declared obscene and render it unobjectionable by the interweaving of threads of language from obscenity statutes. The end result is a sweeping prohibition against the screening of films with sex or nudity in general. The Court of Appeals is correct that incorporation of the statutory definity of obscenity and a listing of forbidden acts or acrobatics merely begs the question because no one in advance of a final judicial ruling has the omniscience to determine in advance whether a film is legally obscene. The court is correct that many of the acts may eventually be held not obscene since the work must be taken as a whole and since contemporary community standards must be applied by the fact finder.

The question can be stated over and over as to whether there can be a prior restraint of future publication of an obscene expression in a civil proceeding without notice and adversary hearing after the initial publicaton of that material. We believe the answer must be no when attempting to apply the public nuisance statute authorizing an injunction against future acts. The teaching of the cases of this Court from *Kingsley Books* v. *Brown, supra,* to date is that only after an adversary hearing when the Court is able to read or examine the publication and acts judicially to enjoin its distribution is there no prior restraint. Only after an adversary hearing and notice can you enjoin a publication and not some blanket ban for the future. *Kingsley Books* v. *Brown* states that the New York court refused to enjoin future issues. In fact, in *Burke* v. *Kingsley Books,* 208 Misc. 150, 142 N.Y.S.2d 735, held that when the court is able to read and examine the publications and acts judicially to enjoin their distribution, there is no previous restraint. This Court refers to the trial judge in *Kingsley Books* in *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, fn. 28 and further indicated that the restraint in *Kingsley Books* ran only against the named publication and was not a catch-all restraint against the distribution of all obscene material.

This Court has pointed out that in cases such as *McKinney* v. *Alabama* and *Paris Adult Theatre* v. *Slaton, supra,* that a finding of obscenity in a civil action under certain circumstances might be in the best interest of all in that no criminal action could be brought unless there was further exhibition or distribution *after the civil action.* North Carolina adopted a statute that no one can be prosecuted until the material has first been determined to be obscene. But North Carolina has adopted a nuisance statute which carries with it a possibility of contempt. See, *State ex rel Andrews* v. *Chateaux, Inc.,* 250 S.E.2d. 603. We believe, as stated in the dissent of that case, that a judge cannot know material is obscene until they see it. To be dealt

with judicially, it must first be judicially seen and, therefore, an injunction describing conduct in the abstract by use of the statutory definition of obscenity would be an impermissible prior restraint. The reasoning is that there must be an adversary hearing and judicial determination of obscenity before the matter may be restrained for the future. This is the further reasoning of the court in Louisiana in *Gulf States Theatres of Louisiana, Inc.* v. *Richardson, supra,* where that court states that a thorough consideration of the cases by the Supreme Court leads it to conclude that in a civil proceeding to abate an obscene expression as a nuisance there can be no prior restraint without an adversary judicial adjudication. The Louisiana court further reasons that an evidenciary hearing and judicial determination is required before an expression which is obscene can be suppressed, prohibited or restrained even before it is published, exhibited or in any way communicated because suppression should not be had but without notice and a hearing.

In *Quantity of Books* v. *Kansas, supra,* this Court said:

> "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public to a free society to unobstructed circulation of nonobscene works."
>
> 84 S.Ct. at 1727.

We contend that an injunction applicable to future films is similar to and as chilling as a seizure without a hearing.

We likewise construe the court's cases of using sensitive tools to determine obscenity and that an injunction which can be fashioned in any language as a judge desires is not the sensitive tool needed for dealing with obscenity. A statute which can be used against protected as well as unprotected expression must require proper notice, a hearing and a judicial determination before material not yet communicated can be restrained. Authorization of the use of public nuisance would not crack the

door but remove the door from its hinges. We do not believe that the bulwarks necessary to protect free expression should be so extended as to permit criminal prosecution under the guise of contempt and that the Court's limited exception for injunctions under *Kingley Books* should not be extended.

We assert that no injunction should affect any material until that particular material has been presented to the Court and in an adversary and evidenciary hearing and there has been a judicial determination of obscenity. Only if there is continued exhibition in the future of the material adjudged obscene could there be any action for contempt. Any lesser requirement would be a prior restraint in violation of the First Amendment.

B. The Texas Statute Permits Private Individuals as Well as Government Officials to Bring Suit.

The Texas Nuisance Statute permits any citizen to sue in his own name and does not require to show that he is specially injured by the acts complained of.

This Court can recognize that this expands the doctrine of public nuisance to eliminate that the person be required to show special injury and opens up the challenge to First Amendment rights to any organization or individual who chooses to harass another. A private individual could bring a nuisance action against a book publisher, a newspaper, a bookstore, a motion picture theatre, a newstand or any other manufacturer, distributor or exhibitor of material presumed protected by the First Amendment and alleged past acts of obscenity and possibly obtain an injunction against unnamed future publication.

That same individual may thereafter file petition after petition to cite the theatre, bookstore or other entity for violation of the injunction. The private individual would become a censor without benefit of an appointment to any official position.

The practical effect of this prior restraint is obvious.

Prior restraint would not only exist by actions of private individuals but local officials during periods of election or during periods of publicity concerning any particular book, motion picture or magazine. They would be tempted to act on the basis of alleged concern for their particular community without regard to the rights guaranteed by the first Amendment.

An example of an action by public officials in a criminal action is *Jenkins* v. *Georgia,* 418 U.S. 153 94 S. Ct. 2750. The local officials charged the defendants were exhibiting an obscene film "Carnal Knowledge," which this Court held as a matter of law was not obscene. In *Gulf States Theatres of Louisiana, Inc.* v. *Richardson,* 287 S.2d 480 (1974), after several seizures of the film "Last Tango in Paris," which the theatre operator resisted by going to appellate courts, the officials sought to enjoin further showing of the film under the nuisance statutes. The film "Last Tango in Paris," which had been shown throughout the United States to millions of individuals, was attacked in this Louisiana municipality as being obscene and was so held and enjoined by the Court.

We believe the Louisiana court was very astute in holding that there was no corollary between control of the nuisance of prostitution and control of expressions which are subject to regulation only when they cross over that fine line into obscenity. The Louisiana court was faced with a statute which required closing of the theatre. The State of Texas does not even contest the fact that such a construction of the Texas statute would also be unconstitutional.

This Court has determined in cases involving search warrants that the duty of the judge is to be a neutral and detached judicial officer. *Lo-Jo Sales, Inc.* v. *New York* *U.S.* , 99 S.Ct. 2319. The judge in a contempt action would be acting as a censor since he acted in the first place in authoring an injunction outlining whatever specific conduct *he determined* would be obscene if portrayed upon the screen.

The private individual or the public official in bringing the action for an injuction would also request the court to determine that *any* conduct which could be considered obscene should be in the injuction of the court.

The Court is left to its discretion under the construction urged by the State of Texas that not only actual sexual acts but simulated sexual acts could also be listed in the injunction and be prohibited by the Court. Such simulated sexual acts, if shown in any unnamed motion picture in the future, could thereupon be determined to be obscene and absolute liability of contempt imposed.

Any book, magazine or film that dealt in any way with sex or in which simulated sex or in which simulated sex acts to any extent were portrayed could be subject to a contempt charge either by petition by the private citizen or public official or by the judge on his own motion. This would certainly chill the exercise of First Amendment rights.

The effect of such a prior restraint would be as much as licensing statutes whereby the license to do business would be revoked because of past conduct violating the First Amendment.

The practical operation of a statute allowing a private citizen without injury as well as public officials to bring suits for injunction in which the judge has unbridled discretion to enjoin any sexual conduct which he would determine in the future was obscene is impermissible prior restraints and the essence of censorship.

C. Motion Picture Films As Commerical Speech Are Protected By the First Amendment

The Texas Court in *Richards* v. *State,* 497 S.W.2d, 770, as do other states courts from time to time, comments on the fact that the distribution of motion picture films is for profit.

Newspapers, books, magazines, motion picture films as well as other activities under the First Amendment are commercial speech and for profit and enjoy the protection of the First Amendment just as political speech.

This Court had the question of commercial speech squarely before it in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.,* 425 U.S. 748, 96th S.Ct. 1817. The Court determined that freedom of speech presupposes a willing speaker and the protection afforded to the communication is also afforded to its source and to its recipient's both. The right to receive information and ideas necessarily protects the right to receive.

The Court pointed out that speech does not loose its protection under the First Amendment because money is spent to project it as in paid advertisements of one form or another or even though sold for profit citing motion picture cases and book cases involving questions of obscenity.

The distribution of motion pictures, books, magazines and newspapers even though sold as a money making enterprise are entitled to protection under the First Amendment. Such an occupation is not unlawful. It is only when the material loses the protection of the First Amendment by being obscene that action, primarily criminal action, might be taken. A limited junction procedure in *Kingsley Books* v. *Brown* might be available. In either case it is subsequent action by notice and a judicial determination in an adversary hearing that restraint is imposed or punishment inflicted. Prior restraint on free speech even though commercial would have the practical effect of self censorship. As stated by this court in *McKinney* v. *Alabama,* 424 U.S. 669, 96th S.Ct. 1189 and *Freedman* v. *Maryland,* 380 U.S. 51, 85 S.Ct. 734, the stake of the distributor or exhibitor may be so small as to be unwilling to accept the burdens and delays of litigation in a particular area when he may freely exhibit his film in most of the rest of the country. The Constitution cannot

force anyone to exercise the freedom of expression which it guarantees. On the other hand those who afforded the opportunity should not be required to suffer until there has been notice and a judicial determination and an adversary hearing before there can be any restraint.

If there is uncertainty because an existing injunction under most circumstances less rather than more communication of ideas will exist. As stated by Juctice Brandeis in his concurring opinion in *Whitney* v. *California*

> "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."
>
> 274 U.S. at 378.

D. A Nuisance Statute May Also Apply to Newspapers As Well As Motion Pictures, Books and Magazines

The Texas nuisance statute could be applied just as the statute was in *Near* v. *Minnesota,* 283 U.S. 696, 51 S. Ct. 625 to Newspapers. An injuction could be issued because of past issues of a newspaper if a private citizen as well as a state or municipal official brought a petition and one judge determined that past issues of a newspaper had been determined to be obscene.

This is not a farfetched assumption since this Court in *Kois* v. *Wisconsin,* 408 U.S. 229, 92 S.Ct. 2245 had to reverse two convictions for disseminating an alleged obscene picture and an alleged obscene poem in an underground newspaper. This is not the first case since other newspapers in college towns have been charged in other cases.

This Court had to reverse not only the trial court but the Supreme Court of Wisconsin that the dominant theme of the newspaper or the poem did not appeal to prurient interest and reversed the conviction.

The freedom of the press of newspapers is rendered subject to the practical operation of injuctions and contempts by officials or private citizens by statutes by such as the Texas statute against the commercial distribution of obscenity.

E. The Texas Nuisance Statute Against Commerical Manufacturer Would Be Applicable Against Book Publishing or Printing Houses or Any Manufacturing of Material Presumed Protected By the First Amendment.

Any printing house could be charged by a public official or a private citizen that a book or magazine printed for an author in the past had been obscene. An injunction could be issued by a judge and the printing house would be subject to contempt charge in the future. Any individual could be fined and imprisoned or any corporation fined if it was determined that any future publication contained any of the specified conduct listed in the injunction was obscene. A judge would not only determine at the contempt hearing if the new material was obscene but based upon this factual determination and lack of self censorship by the publisher that punishment would be rendered. Any book publisher which published books, poems or magazines would have to use a form of self censorship or face absolute liability for contempt if that future publication were found obscene since the publisher would have knowingly published the material and knew or should have known of its contents.

This system of prior restraint in practice or in practical operation is a serious prior restraint.

F. Obscenity Elements Are Questions of Fact to Be Measured By Contemporary Standards of the Community.

While this Court has determined that the criminal elements of the crime of obscenity are not vague or indefinite, the Court has stated that what appeals to the prurient interest or what is

patently offensive are questions of fact to be measured by contemporary standards of the community. *Smith* v. *United States,* U.S. 97 S.Ct. 1756. In *Smith,* this Court stated:

> "The phrasing of the Miller test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to prurient interest is one such question of fact for the jury to resolve. The Miller opinion indicates that patent offensiveness is to be treated in the same way. . . . The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked."
>
> 97 S.Ct. at 1763-64

The Court further went on to say:

> "It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest or patent offensiveness, if it were even possible for such a definition to be formulated."
>
> 97 S.Ct. at 1764.

We submit that not only would it be difficult for the judge to make that determination according to contemporary community standards but that it would be impossible for the judge in an injunction order to freeze the definition of contemporary community standards. Otherwise, the injunction is not to exhibit certain sexual conduct which the Court might in the future find to be obscene if it were presented to him. If the Court so found it to be obscene, the person would be guilty of contempt of court and not merely subject to a charge of violating the criminal law.

The motion picture operator does not have the right to present to a jury for consideration what are contemporary community standards and have that jury make the judgment. The operator is facing a judge who labeled the depiction of certain sexual conduct obscene per se. Sex and obscenity are not synonymous. Just as Justice Stephens said in the dissent in *Smith,* there are serious well intentioned people who are persuaded that explicit sexual material serve a worthwhile purpose as well as the fact that the demand for comparable materials indicate that the materials do provide amusement or information or at least satisfy the curiosity of interested persons.

Justice Brennan in his concurring opinion in *McKinney* v. *Alabama, supra,* stated the Court recognized in *Miller* the complexity of the test of obscenity and the vital necessity in its application of safeguards to prevent the denial of the protection of freedom and press from non-obscene materials. He further pointed out that the prior restraint increases the possibility of an erroneous determination because the material may never be available to the public and thus "never have truly faced the acid test of acceptance under prevailing community standards." If there is to be an injunction with a chilling effect against future material which contains certain explicit conduct, that material may never have had the chance to have public acceptance under prevailing community standards but be inhibited and chilled because of the injunction against the person and the possibility of contempt action.

G. Injunctions Against Future Publications Promote Uneven and Improper Applications.

The State of Texas contends that an injunctive order against future unidentified films is not an imposing weapon and is cumbersome and ineffectual. We strongly disagree.

Such an injunction is subject to wide-spread abuse. The injunction suggested by the State of Texas as compared to the in-

junction sought later and received by Henry Wade, the District Attorney of Dallas County, are different. The Dallas injunction is broader and its recitation of specific conduct tracts the language of the obscenity statute.

There is no specificity as required by Texas Rules of Civil Procedure that an injunction be definite in its terms. Specific sexual conduct in an injunction is not necessarily obscene but must be judged just as every motion picture is judged on its own merits and in its context. It must appeal to the prurient interest and be patently offensive when considered in relation to contemporary community standards prevailing at the time.

An example of the abuse of an injunction against unnamed future films is in the State of Tennessee, where the Tennessee Supreme Court in 1967 in *New Riveria Arts Theatre, et al.* v. *State of Tennessee ex rel Davis,* 412 S.W.2d 890, determined that the statute did not permit an injunction against unnamed future films. Nevertheless, a local criminal court in Knoxville, Tennessee issued an injunction against any film which depicted certain sexual conduct. *News Mart, Inc.* v. *State ex rel Webster,* 561 S.W.2d 752 (1978). The Tennessee Supreme Court determined that the injunction was beyond the power of the statute and that such a construction of the statute would vest in the courts an unlimited power of prior restraint on freedom of speech and press. Nevertheless, while said injunction was on appeal, V.S.D., Inc. and several of its employees were charged with twenty-six (26) acts of contempt of showing motion pictures in violation of the injunction. The penalty for contempt in Tennessee is ten (10) days in jail and a Fifty Dollar ($50.00) fine. The court sentenced each of the employees to ten (10) days consecutively or 260 days plus a Fifty Dollar ($50.00) fine on each count. The Court is aware of the rule that an injunction must be obeyed even though issued in error except where it is void from lack of jurisdiction. The Court of Appeals of Tennessee reversed the contempt convictions on future unnamed films, which convictions had been based upon affidavits of the

officers presented with the show cause order and testimony of the officers as the contents of the films which were not produced in evidence. *V.S.D., Inc., et al.* v. *State of Tennessee ex rel Webster,* S.W.2d (No. 502 Ct.C.A., Aug. 14, 1978). A number of the cases which were cited by the Fifth Circuit Court of Appeals where injunctions had been reversed also bear out the abuse of such an injunctive process.

Where so much chance exists for mischief, the use of public nuisance statutes as a tool for the control of obscene publications in the future is not sensitive enough to withstand the test established by this Court for dealing with obscenity and is an impermissible prior restraint.

H. The Statute Permits Unlimited Discretion of the Court in Framing an Injunction.

The State of Texas would state that a court could identify specified sexual conduct which, if shown and which otherwise was obscene because of violation of the elements of the offense of obscenity, would be prohibited in an injunction.

The trial judge in issuing a temporary or a permanent injunction would thereby be permitted under the definition of *Miller* v. *California,* 413 U.S. 15 93 S.Ct. 2607, to state in the injunction that patently offensive representations or descriptions of ultimate sexual acts, actual or simulated, or exhibition of the genitals which otherwise are obscene under the definition in criminal law would be enjoined. The language which might be expressed in an injunction is unlimited and becomes prior restraint or censorship against future unnamed publications subjecting a person to absolute liability of contempt if the Court at a later date found that such a publication had been exhibited or distributed and was obscene.

I. Public Nuisance is Coming in the Back Door Against First Amendment Rights.

The use of an injunction against future publications is prior restraint and not subsequent punishment and is coming in the back door against First Amendment rights. Because of past actions an injunction is issued. The injunction is issued not on the basis of a conviction of selling or distributing obscene material where the proof has been established that the person was guilty beyond a reasonable doubt. The injunction is issued on the basis of past conduct and states that if the person distributes or exhibits material in the future which contains certain sexually defined conduct, which also appeals to the prurient interest, is patently offensive and without serious value so as to be obscene, then the person shall be guilty of contempt and subject to punishment. This is an inherent threat of censorship and the Court should now not allow this abuse of the freedom of speech guaranteed by the First Amendment. Public nuisance was intended for police power regulation of prostitution, gambling, illegal liquor as well as obnoxious odors and other common law applications of a nuisance. The particular existing conduct is enjoined as a public nuisance and the continuance *of that particular conduct,* such as prostitution or gambling, is enjoined. A motion picture, a book or a magazine, however, is individually judged on its own merit and content. Continued gambling is a fact easily recognized. The independent review and judgment of a future motion picture which might contain acts which considered with the other elements of obscenity may be obscene, however, is not a fact of easy establishment. To allow contempt action or to even permit an injunction which would stop the future distribution or exhibition is a prior restraint and one that should not be permitted under the First Amendment.

It is capable of sweeping or chilling the nonobscene as well as the obscene. To urge that the distribution of obscene material is illegal and, therefore, is a public nuisance is a circular argument. It begs the question of whether traditional nuisance regulation is consistent with First Amendment rights. It is one thing to abate gambling, filthy food and another to abate the sale of filthy books or motion pictures. Food is not protected by the First Amendment, neither is liquor or prostitution. The practical operation of such a statute is a serious prior restraint.

4. The *En Banc* Decision of the Fifth Circuit be Affirmed that any Statute Which Would Authorize a One-Year Closure Order Against an Establishment Found to be a Nuisance Because of Commercial Obscenity, Unless a Penal Bond of Up to $5,000 is Posted to Insure Against Future Violations of the Nuisance Laws is Unconstitutional Under the First and Fourteenth Amendments as applied to Film Exhibitors Because the Law Authorizes the Imposition of a Prior Restraint Against the Future Exhibition of any Film, Whether Obscene or Not, Upon a Finding That Obscene Films Have Been Exhibited in the Past.

The State of Texas in its brief and in the Jurisdictional Statement conceded that the mandatory closing of premises under a nuisance statute would be unconstitutional as applied to the motion picture houses or book stores.

The Fifth Circuit, as a precautionary matter, determined that if the closing and bond provisions of the nuisance law could be applied, that this would be an impermissible pior restraint since the State would be enjoining the future operation of a business which disseminates presumptively First Amendment protected material solely on the basis of the nature of the materials which were sold in the past. The Fifth Circuit in its opinion cites numerous cases in which the bond and closing provisions were found unconstututional when applied to First Amendment protected materials or that such a remedy was not applicable under the statute. See *Universal Amusements Company, Inc.* v. *Vance,* 587 F.2d 159, footnote 13.

Courts have said such a remedy of closing a theatre creates an *in terroram* effect, a draconian effect, and the effect of sledge hammering the printing press, the camera and all the tools of expression in every medium. Licensing statutes are analogous to a public nuisance statute since the revocation of a license to do business would stop the showing of all motion pictures whether protected or not or the sale of all books. Licensing cases also would support the proposition that such a public nuisance scheme, similar to licensing, is a prior restraint. See *Jodbor Cinema, Ltd.* v. *Sedita,* 309 F.Supp. 868; *Oregon Book Mart Corporation* v. *Schrunk, et al.,* 321 F.Supp. 639; and *Seattle* v. *Bittner,* 505 P.2d 226 (Wash. 1973).

While the Fifth Circuit interpreted the Texas statute as not permitting the bond or penal provisions to be applicable to injunctions against obscenity, this Court should be aware from the numbers of cases that state and local officials have attempted to use this obviously unconstitutional provision. We respectfully request, therefore, that the Court take note of this holding by the Fifth Circuit and affirm that the use of closure provisions, bonds and other matters under a public nuisance or Red Light Abatement statute would be clearly a prior restraint not permissible under the First and Fourteenth Amendment.

5. Appellee and the Prevailing Party Is Entitled to An Award of Attorneys' Fees.

The appellee sought a remand for a determination and award of costs and attorneys' fees as authorized by the Attorneys' Fees Award Act of 1976 which revised 42 U.S.C. §1988 to permit award of legal expenses to prevailing parties in suits brought under the Civil Rights Act, 42 U.S.C. §1981-86. The Fifth Circuit Court of Appeals determined that attorney's fees and costs should be awarded and accordingly remanded the case to the managing judge of the district court with directions to set reasonable attorney's fees in accordance with the standards established in *Johnson* v. *Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974).

Appellee contends that pursuant to said statute as held constitutional in *Hutto* v. *Finney,* U.S. , 98 SCt. 2565, 57 L.Ed.2d 522 (1978), and other cases, that the cause should be remanded for the district court to determine the total award, including an award for reasonable attorney's fees in this Court. Although not mentioned in the Brief, the State of Texas in the Jurisdictional Statement, contends the State by the consolidation of the case was forced into areas of litigation not originally contemplated. Appellee believes that the State of Texas should be responsible for the fees and that upon remand of the determination of this question, that the appellee should be awarded reasonable attorney's fees and costs. There is certainly a substantial saving of legal costs in that only three of the twenty cases were heard. That portion of the decision of the Fifth Circuit applicable to *Dexter* v. *Butler,* granted attorney's fees to the appellee and remanded the cause for determination of the amount. Certiorari was denied by this Court.

Appellee sees no difficulty in this Court remanding the cause for award to the appellee as prevailing party of reasonable attorney's fees and costs.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed and the cause remanded to the managing judge of the District Court for award of attorney's fees and costs to the appellee.

Respectfully submitted,

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APPENDIX.

APPENDIX

Rule 680. **Temporary Restraining Order**

No temporary order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the Clerks's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Rule 681. **Temporary Injunctions: Notice**

No temporary injunction shall be issued without notice to the adverse party.

Rule 683. **Form and Scope of Injunction or Restraining Order**

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Rule 692. **Disobedience**

Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending or with the judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting the same; and thereupon the court or judge shall cause to be issued an attachment for such person, directed to the sheriff or any constable of any county, and requiring such officer to arrest the person therein named if found within his county and have him before the court or judge at the time and place named in such writ; or said court or judge may issue a show cause order, directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. On return of such attachment or show cause order, the judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction, either directly or indirectly, may commit such person to jail without bail until he purges himself of such contempt, in such manner and form as the court or judge may direct.

Art. 1911a. **Contempt; power of courts; penalties**

Inherent power and authority of courts

Section 1. A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

Penalties for contempt

Sec. 2. (a) Every court other than a justice court or municipal court may punish by a fine of not more than $500, or by confinement in the county jail for not more than six months, or both, any person guilty of contempt of the court.

(b) A justice court or municipal court may punish by a fine of not more than $100, or by confinement in the county or city jail for not more than three days, or both, any person guilty of contempt of the court.

(c) Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred.

Confinement to enforce order

Sec. 3. Nothing in this Act affects a court's power to confine a contemner in order to compel him to obey a court order.

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AUG 25 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-1588

CAROL VANCE, et al.,

Appellants,

v.

UNIVERSAL AMUSEMENT CO., INC., et al.,

Appellees.

GEORGE E. McCREA, et al.,

Appellants,

v.

KING ARTS THEATRE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS, WITH BRIEF ANNEXED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-1588

CAROL VANCE, et al.,
Appellants,
v.
UNIVERSAL AMUSEMENT CO., INC., et al.,
Appellees.

GEORGE E. McCREA, et al.,
Appellants,
v.
KING ARTS THEATRE, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS, WITH BRIEF ANNEXED.

Charles H. Keating, Jr., (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the United States Supreme Court, for leave to file a brief as amicus curiae in support of the Appellants herein. The consent of the Appellants has been

obtained and has been filed with this Court. The consent of Mr. Frierson H. Graves, Jr. counsel for Appellees, Universal Amusement Co. Inc. and King Arts Theatre Inc., was requested by letter dated July 12, 1979 and was declined by his letter dated July 16, 1979.

Moving party has a special interest in the subject of this appeal, both as a member of the Presidential Commission on Obscenity and Pornography and author of one of the dissenting reports of that commission and as the founder and co-counsel for "Citizens for Decency Through Law Inc." (short title "CDL"). In my dissenting Commission report, I noted that "there was a trend developing which treats obscenity as nothing more than an ancient common law scourge whose remedy lies in 'abatement' as a common law nuisance."[1/] For the past ten years, CDL attorneys have assisted law enforcement in the development of this public nuisance concept and, based upon that experience, hold the opinion that state public nuisance statutes, like the Texas statute involved in this appeal, offer the most effective vehicle for attacking the obscenity problems that plague this nation.

1/ See, The Report of the Commission on Obscenity and Pornography, September 1970, at pages 605-609.

Progress in that direction in the State of Texas has been blocked for the past six (6) years by the federal interference herein under review.

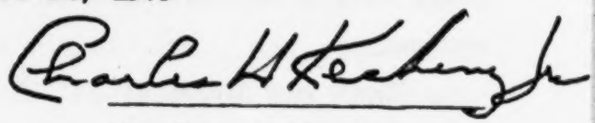
There are three areas of concern [2/] which give moving party reason to believe that relevant "facts or questions of law will not adequately be presented by the parties": (1) the suggestion which is implied in the jurisdictional statement that the public nuisance remedy "presents a dubious tool for the control of obscenity," (2) the narrow framework of facts in the record - or rather, the lack of the same - within which the three major issues are being presented to this Court, and (3) Appellant's avoidance of the abstract question whether "closure" and its alternative bond requirement can ever be applied by a Texas Court as an equitable remedy in a proper case.

Moving party believes that the arguments presented in the Amicus Brief which is annexed may not be fully discussed in the appellant's brief on the merits and, therefore, respectfully requests that he be granted leave to file a brief amicus curiae setting forth the

2/ See "Interest of Amicus Curiae" at page 3 of the amicus curiae brief which is annexed hereto.

same, for such assistance as they may provide to the individual justices sitting herein.

Dated: August 24, 1979



Charles H. Keating, Jr.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-1588

CAROL VANCE, et al.,
Appellants,

v.

UNIVERSAL AMUSEMENT CO., INC., et al.,
Appellees.

GEORGE E. McCREA, et al.,
Appellants,

v.

KING ARTS THEATRE, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF CHARLES H. KEATING, JR., IN SUPPORT OF APPELLANTS.

INTEREST OF AMICUS CURIAE

Amicus Curiae has a special interest in the subject of this appeal, both as a member of the Presidential Commission on Obscenity and Pornography and author of one of the dissenting

reports of that commission,[1] and as the founder and co-counsel for "Citizens for Decency Through Law Inc." (short title "CDL"). In my dissenting Commission report I noted that "there was a trend developing which treats obscenity as nothing more than an ancient common law scourge whose remedy lies in 'abatement' as a common law nuisance."[2] For the past ten years,

1/ See, The Report of the Commission on Obscenity and Pornography, September 1970, at pages 513-628.

2/ Id. at 605-609. The two principal Ohio public nuisance abatement cases relied upon in that report, have since been affirmed on appeal. State of Ohio ex rel. Keating v. A Motion Picture Film Entitled "Vixen" et al., 27 Ohio St.2d 278, 56 Ohio Ops.2d 165, 272 N.E.2d 139, vacated and remanded on other grounds in A Motion Picture Film Entitled "Vixen" et al. v. Ohio ex rel. Keating (71-599) 413 U.S. 905, 37 L.Ed.2d 1016, 93 S.Ct. 3033 (June 25, 1973), opinion adhered to on remand in 35 Ohio St. 2d 215, 301 N.E.2d 880; Ohio ex rel. Ewing v. Art Theatre Guild Inc. ("Without A Stitch") 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974), appeal dismissed for want of a substantial federal question in Art Theatre Guild Inc., et al., v. Ohio ex rel. Ewing (No. 73-1973) 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975). The underlying principles expressed in the two California cases noted in such report, Weis v. Superior Court of San Diego County, 30 Cal.App. 730, 159 P.464 (June 14, 1916) and People v. Lim, 18 Cal.2d 872, 118 P.2d 472 (Nov. 27, 1941) have since provided the legal precedent for

CDL attorneys have assisted law enforcement in the development of this public nuisance concept and, based upon that experience, hold the opinion that state public nuisance statutes, like the Texas statute involved in this appeal, offer the most effective vehicle for attacking the obscenity problems that plague this nation. Progress in that direction in the State of Texas has been blocked for the past six (6) years by the federal interference herein under review.

There are three areas of concern which give moving party reason to believe that relevant "facts or questions of law will not adequately be presented by the parties": (1) the suggestion which is implied in the jurisdictional statement that the public nuisance remedy "presents a dubious tool for the control of obscenity," (2) the narrow framework of facts in the record - or rather, the lack of the same - within which the three major issues are being presented to this Court, and (3) Appellant's avoidance of the abstract question whether "closure" and its alternative bond requirement can ever be applied

the California Supreme Court's decision upholding the constitutionality of the California public nuisance abatement statute. People ex rel. Busch et al. v. Projection Room Theater, 17 Cal.3d, 42, 130 Cal.Rptr. 328 (June 1, 1976).

by a Texas court as an equitable remedy in a proper case.

As to the first area of concern, it is respectfully submitted that the "dubious tool" remark in the jurisdictional statement was written in haste and without proper reflection on what is at stake. That analysis focuses too sharply on the injunctive aspect and fails to perceive this common law remedy as the special type of equitable lawsuit that it has become. The "public nuisance" concept should be appraised in a different light than merely an "injunctive" tool. It is an ancient common law remedy which, in a proper case such as where the criminal remedy is inadequate, fills the gap and provides government with a host of other potential legal and equitable weapons; namely, (1) tort damages, both compensatory and punitive, and (2) other equitable remedies, such as a constructive trust of moneys derived from unlawful conduct, forfeitures, an equity court's historic powers to award attorney's fees where conduct is malicious, and to reform real property where it has acquired a public reputation as a per se moral public nuisance. Specific relief using the public nuisance civil lawsuit can be obtained in the courtroom, either by virtue of judicial gloss on existing civil

public nuisance abatement statutes, Trans - Lux Corp. v. Alabama ex rel. Sweeton, 366 So.2d 710, 174, (January 19, 1979); People ex rel. Busch et al. v. Projection Room Theatre et al., 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976); In re Ward, 82 Cal.App.3d 974, 147 Cal.Rptr. 476 (July 20, 1978), or thru special legislation mandating specific relief on the subject matter. For example, see Chapters 1 and 4, Title 52 of the Idaho Code; R.C.W. sections 7.48.050-900; Chapter 19 of North Carolina General Statutes; Arizona Revised Statues, sections 12-811 through 12-818. A copy of the Idaho, Washington, North Carolina and Arizona statutes is attached to this brief as appendix A.[3/]

As to the second area of concern, moving party submits that the record upon which the Court of Appeals reached its decision is incomplete, abstract, and in such a complete state of disarray that it may have ceased to provide this Court with a proper "case or controversy" within the meaning of Article III of the federal constitution or an "actual controversy" within the meaning of the declaratory judgment act. The

3/ In drafting its blueprint, this Court has often seen fit to refer to other legislative patterns. See Miller v. California, 413 U.S. 15, 35 L.Ed.2d 419, 93 S.Ct. 2607 at page 430, footnote 6.

Vance case was originally filed in November 1973. Like Topsy, it grew and grew, until finally in 1975 it was tried in the federal district court as a consolidated case involving 20 different factual situations spread out over the entire state of Texas. (The Northern, Southern, Eastern and Western District of the U.S. District Court for Texas.) Then, in its succeeding four years on appeal it has collapsed and shrunken to an en banc review wherein the 3 major legal issues were resolved in the background of one abstract declaratory judgment action, filed in November 1973, King Arts v. McCrea. See 587 F.2d at 162 fn. 1. One of the factors which should have provided the en banc majority below with a 1973 answer to one of their objections re Texas procedure, is not now the law, having been repealed in January 1974. See footnote 4 at page 18. For example, the en banc dissent below paraphrased one of the majority's procedural "safeguards" at 587 F.2d 176 as:

> "To apply, their rule must be rewritten to run as follows: where a preliminary judicial decision resulting from an adversary hearing has been made that matter is probably obscene and should be taken off the market pendente lite, a procedural scheme - to be valid as applied to pornography - must further require that the judge conduct a prompt hearing on the merits of obscenity and render a prompt final judgment on it as well."

Yet, that very "safeguard" existed at the time King Arts v. McCrea was filed, in the special Texas search warrant procedure, Article 527 Sections 9(g) and 9(h) (See appendix E-3) which then controlled the multiple seizures of "Deep Throat" which the federal trial court was so concerned about, see 404 F.Supp. 33 at 37, and should have disposed of that issue in the case in 1973, had it been heard by the federal court in a timely fashion.

The federal action below stopped a number of state actions during the period 1973-1975 which, if permitted to proceed to trial, would have brought about an authoritative state court construction and would have placed upon the Texas public nuisance statute the "gloss" which the Court of Appeals below confessed it had no jurisdiction to impart. See 587 F.2d 159 at 172. U.S. v. 37 Photographs, 402 U.S. 363, 369, 28 L.Ed.2d 822, 830, 91 S.Ct. 1400 (May 3, 1971). Compare the Texas result with the result reached in California in People ex rel. Busch et al. v. Projection Room Theater et al., supra; and In re William Ward, 82 Cal.App.3d 974, 147 Cal.Rptr. 476 (July 20, 1978). Where a state statute can be rendered consistent with constitutional

principles by further state court interpretation, as a public nuisance statute assuredly can, the federal court is required to leave that matter for decision by the state forum. Railroad Commissioner v. Pullman Co., 312 U.S. 496, 85 L.Ed.2d 971, 61 S.Ct. 643.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, (Before Ingraham, Circuit Judge, and Singleton and Taylor, District Judges) was filed on July 3, 1975 and is reported in Universal Amusement Co., Inc., et al. v. Carol Vance et al., (Civ A. No. 73-H-528), 404 F.Supp. 33.

The opinion of the United States Court of Appeals, Fifth Circuit (Before Thornberry, and Gee, Circuit Judges and Markey, Chief Judge) was filed on September 28, 1977 and is reported in Universal Amusement Co., Inc., et al. v. Carol Vance et al., ect., 559 F.2d 1286.

On rehearing En Banc, the opinion of the United States Court of Appeals, Fifth Circuit (Before Brown, Chief Judge, Thornberry, Coleman, Goldberg, Ainworth, Godbold, Clark, Roney, Gee, Tjoflat, Hill, Fay, Rubin and

Vance, Circuit Judges) was filed on December 18, 1978 and is reported in Universal Amusement Co., Inc., et al. v. Carol Vance et al., and King Arts Theatre Inc., v. McCrea, 587 F.2 159.

STATEMENT OF JURISDICTION

Jurisdiction in the federal district court was based on 28 U.S.C. section 1343, 42 U.S.C. section 1983, and 28 U.S.C. section 2201 (declaratory judgments).

The jurisdiction of this Court rests on 28 U.S.C. section 1254(2).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Article 4667(a)(3) of the Revised Civil Statutes of Texas, which declare the habitual use of any place for the commercial manufacturing, commercial distribution, or commercial exhibition of obscene materials shall constitute a public nuisance, which shall be enjoined at the suit of either the State or any citizen, was constitutional on its face.

2. Whether article 4666 when read in conjunction with article 4667 (a)(3) of the Revised Civil Statutes of Texas, was susceptible of further interpretation by the Texas State Court which would render it constitutional, and if so, whether in advance of that construction, a federal court has the authority to undertake that con-

struction.

3. Whether article 4667(a)(3), as interpreted by the decisional law of the Texas Court of Civil Appeals in Richards v. State and Locke v. State to authorize the issuance of an injunction against the future exhibition of unnamed obscene films that depict particular acts enumerated in the Texas obscenity statute, was unconstitutional as a prior restraint on materials not yet declared obscene.

4. Whether the Texas injunction procedures, which authorize a temporary injunction to be obtained against obscene materials as an ancillary remedy in conjunction with the Texas public nuisance statute, Article 4667(a)(3) of the Revised Civil Statutes of Texas, was constitutionally infirm for its failure to provide the procedural safeguards set forth in Freedman v. Maryland.

STATEMENT OF THE CASE

Shortly after this Court decided the Miller Quintet of cases in June of 1973, the Court of Civil Appeals of Texas, Beaumont, decided Richards v. Texas, 497 S.W.2d 770, an injunctive action brought under Texas Penal Code Article 527 section 13. (See Appendix E-5 to this brief). In granting equitable

relief and upholding an injunction which enjoined the defendants from:

> "(a) exhibiting or distributing 9 specific films, and (b) exhibiting or selling any other films which show actual acts of fellatio, cunnilingus, actual oral genital contact between two or more males or females, any sexual intercourse between human and animal or between human males and females, and which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value,"

the Texas Court equated the defendants' conduct to that of a "public nuisance" and justified such relief under his authority to grant equitable relief as to that type of conduct.

At or about the same time, the prosecution of obscenity connected activities mushrooned all over the state of Texas (including a major effort to halt the exhibition of "Deep Throat") with law enforcement using the civil approach which had been upheld in Richards, supra, as well as prosecution under the criminal statutes. The defendants countered by filing civil rights and declaratory judgment lawsuits in the federal district courts, seeking to enjoin the state court law enforcement actions, and to obtain a declaratory judgment that the Texas statutes and their application by law enforcement were

unlawful.

Concurrently, (January 1, 1974) the Texas Penal Code was amended in its entirely. Thereafter, instead of pursuing an authoritative interpretation of the new Texas statutes in the state courts, the defendants continued filing civil rights and declaratory judgment actions in the federal courts throughout the state of Texas, asking those federal courts for an interpretation of the state statutes. Finally, the Fifth Circuit Court of Appeals ordered 20 of the cases consolidated for a hearing in the Houston District Court by a Three-Judge panel.

The federal court system did not decide those cases promptly. Although the record in the consolidated case was compiled by stipulation and did not involve a factual trial, as such, the decision of the trial court in the consolidated case was not filed until 18 months after the first federal action was filed. The first Court of Appeals decision (three judges) was not filed until 30 months later, and the second Court of Appeals decision (en banc) was not filed until 15 months after the first filing.

Although the change in the law of public nuisance, which prompted the federal lawsuits,

had only recently been enacted by the state legislature (in January 1, 1974), the federal judiciary did not defer to the state judiciary for an "authoritative interpretation" but elected themselves, instead, to give that legislation its first interpretation. The statutory interpretations given by the federal judiciary to the Texas public nuisance statute were not in agreement. Not only did each successive panel on the Court of Appeals disagree with the trial court interpretation, but the panels themselves disagreed, as did the judges on the same panel.

The record in the case on review, King Arts Theatre v. McCrea, shows that the federal action was filed by the theater under the civil rights and declaratory judgment statutes after receiving a letter from the landlord that the lease was being terminated to avoid the inconvenience and embarrassment of joinder as a defendant in a suit to enjoin the showing of pornographic films. 559 F.2d 1289 at footnote 2; 587 F.2d at 163, footnote 3. The trial court's finding that "the landlord was terminating King Arts lease' at the suggestion' of the county attorney" is not supported by the record, but was not challenged by the parties on appeal.

The principal issues are: (1) whether the record on appeal in Kings Arts Theater v. McCrea,

presents a proper "case or controversy" within the meaning of Article III of the federal constitution, or an "actual controversy" within the meaning of the declaratory judgment act; (2) whether the Texas public nuisance statute, article 4667(a)(3) of the Revised Civil Statutes of Texas, was facially constitutional; and if so, (3) whether, in view of U.S. v. 37 Photographs, supra, the federal district court had jurisdiction to "authoritatively interpret" the recently enacted Texas civil public nuisance statute.

STATEMENT OF FACTS

On July 2, 1973, the Court of Civil Appeals of Texas in Beaumont decided Richards v. Texas, 497 S.W.2d 770 wherein that Court granted injunctive relief under the authority of Art. 527 section 13, Vernon's Penal Code (1972 Supp). A copy of Texas Penal Code article 527 section 13 is attached to this brief as Appendix "E". The cause had been tried to a jury and submitted on oral arguments on June 20, 1973, one day before this Court's decisions in Miller v. California, 413 U.S. 15 and its companion cases. See 497 S.W.2d at 772. The jury found that 9 specific films were obscene and that the defendants knowingly permitted the distribution

of such films. The trial court enjoined the defendants from: (1) exhibition and distribution of the specific films (2) exhibition and distribution of any other obscene material as defined in Article 527 of the Texas Penal Code, and (3) exhibiting or selling any other films which show actual acts of fellatio, cunnilingus, sexual intercourse etc.

In its July 2, 1973 decision in Richards v. Texas, supra, the Court of Civil Appeals affirmed the first part of the injunction, struck the second part as failing to provide proper guidelines under applicable State statutes, and modified the third part under what the Court considered to be the explicit holding of Miller, supra, by adding a sentence reading "The injunction granted by this paragraph of the order is limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have any serious literary, artistic, political, or scientific value." In explaining its authority under Article 527 section 13 (See Appendix E-5 infra), the Court of Civil Appeals likened the defendants' conduct to that of a public nuisance and stated that in such cases, "equity has been able to fashion the remedies necessary to the public

welfare," at page 780:

> ". . . Historically, in other areas of the law than pornography, equity has been able to fashion the remedies necessary to the public welfare. Thus, if we liken defendants' conduct to that of a public nuisance, there would be no obstacle to equity enjoining its continuance. See the long line of cases cited in Lowe, 6 Texas Practice, Remedies §33, p. 61 (2d Ed. 1973). We are unwilling to hold that there is no method which can be found to stop conduct of parties such as shown by our record."

At or about the same time, hard core films such as "Deep Throat" and "Devil in Miss Jones" invaded the State of Texas. State law enforcement brought both criminal prosecutions and equitable actions under Article 527 section 13 in an attempt to stop that conduct as a public nuisance. The pornography industry countered by filing civil actions in the federal district court under the civil rights act, 42 U.S.C. section 1983, and the declaratory judgment statute, 28 U.S.C. section 2201, all of which cases were set before three-judge Courts. What happened after this Court's decision in Miller, supra, and the Texas State Court decision in Richards is explained in U.S. District Judge Singleton's opinion in 404 F.Supp. 33 at 37. (July 3, 1975):

> ". . . the prosecution for alleged obscenity-connected activites mushroomed all over the state of Texas. Each time a defendant would seek to have his obscenity prosecution enjoined in a federal court in Texas, Chief Judge John R. Brown would consolidate such case with the instant three-judge case. A full list of all of the cases can be found in an appendix to this opinion."3a/

3a/ The collateral attack in the federal court on State law enforcement efforts involved the following cases:

NORTHERN DISTRICT

1. Jones v. Dyson CA-3-7024-N/D.
2. Associated Theatres v. Dyson CA-3-7398-N/D.
3. Associated Theatres v. Wade CA-3-7347-N/D.
4. Ellwest Theatres v. Walls CA-4-74-45-N/D.
5. Cinema X v. Curry and Walls CA-4-74-28-N/D.
6. Carson v. Baily CA-7-74-65-N/D.
7. Claybrook v. Baily CA-7-74-43-N/D.
8. Lovely v. Driver CA-7-74-45-N/D.
9. King Arts v. McCrea CA-6-345-N/D. (San Angelo)
10 Ellwest v. Byrd CA-3-74-130-E N/D.

SOUTHERN DISTRICT

1. Universal Amusements v. Vance C.A. 73-H-528 S/D. (Houston)
2. Hargrove v. Hill C.A. 73-H-1114 S/D. (Houston)

EASTERN DISTRICT

1. Sun Family Entertainment v. Hanna B-74-142 C.A. E/D. (Beaumont)

WESTERN DISRTICT

1. Southland Theatres v. Butler S.A.-73-CA-214 W/D. (San Antonio)
2. San Antonio Bookmart v. Smith A-74-CA-078 W/D.
3. Wells v. Miles A-74-CA-189-W/D
4. Cook v. Peters S/A-74-CA-176 W/D (San Antonio)
5. McKenzie v. Butler S/A-74-CA-35-W/D. (San Antonio)
6. Gernon v. Simpson A-75-CA-34 W/D
7. Dexter v. Butler SA-74-CA-168 W/D (San Antonio)

"On August 12 the managing judge of this three-judge court, Honorable John V. Singleton, held a pretrial conference at which attorneys representing all of the parties in each of the cases then consolidated appeared.

"The cases, as they were consolidated into the original case, presented a variety of challenges to Texas statutes. Not only was the constitutionality of the substantive obscenity statutes challenged but also the use of statutes allegedly designed for purposes other than the closing down of purported commercial obscenity was challenged, as were the old and new public nuisance statutes used to abate the alleged public nuisance of commercial obscenity. Finally, the law on obscenity had changed. In June of 1973, the Supreme Court decided the Miller quintet."

". . . The Texas obscenity laws, too, had changed. (4/) On January 1, 1974,

(4/) The Texas penal laws were changed on January 1, 1974. On that date, Acts 1973, 63rd Legislature p. 883, chapter 399 became law and brought about the following changes:

(1) Section 1 enacted into law a new Texas Penal Code. Section 3(a) thereof repealed articles of the Texas Penal Code of 1925 and Vernon's Texas Penal Code, as amended.

(2) Sections 2(A) through 2(E) amended certain articles of the Code of Criminal Procedure, 1965,

(3) Sections 2(F) through 2(J) amended certain articles of the Revised Civil Statutes of Texas, 1925,

(4) Sections2(K) and 2(L)amended certain provisions of the Texas Business Corporation Act, and

the old article 527 was repealed, and in its place section 43.21 et seq. of the new penal code was enacted. The Texas public

(5) Sections 2(M) and 2(N) amended certain provisions of the Texas Non-Profit Business Corporation Act.

The relevant changes in the new Texas Penal Code were as follows: Chapter 43 B of the new Penal Code enacted a new law on obscenity contained in sections 43.21, 43.22, 43.23 and 43.24 of the Code. A copy of those sections is attached to this brief at Appendix B.

The relevant changes in the Code of Criminal Procedure were as follows: Chapter 18, Code of Criminal Procedure, 1965 "Search Warrants" was amended in its entirety.Article 18.02(6) specifically named obscene materials and replaced the former special Search Warrant Procedures in Penal Code Article 527 section 9. A copy of those sections is attached to this brief at Appendix C.

The relevant changes in the Revised Civil Statutes of Texas, 1925 were as follows: Article 4664 (Nuisance) and Article 4667 (Injunctions to Abate Public Nuisances) were amended. A copy of Articles 4664 through 4667 is attached to this brief at Appendix D.

The relevant changes brought about by the repeal of the Texas Penal Code were as follows:

(1) Article 527 "Obscene Articles" consisting of 13 sections, including specific legislation on search warrants (section 9) and enforcement by injunction (section 13) was repealed. A copy of article 527 is attached to this brief at Appendix (E)

Two months after Judge Singleton's decision was filed, the state legislature again amended Texas Penal Code section 43.21 (Definitions) by encorporating into Texas law, the definition for "obscene" set forth in Miller v. California, supra, a copy of which is attached at Appendix (F).

nuisance statutes, also, were changed to specifically provide for the enjoining of the use of a premises for purposes of commercial obscenity.

"In an effort to simplify the process of deciding all of these varied cases, the managing judge chose three of the cases which presented the least jurisdictional problems and also presented straightforwardly at least one of the challenges brought on by each of the remaining cases.

"On November 15, 1974, the three-judge court again convened to hear oral arguments in each of the three cases. Each of the three sets of parties had earlier submitted a joint Pretrial Order, in which material and important facts had been stipulated and briefs on the points of law involved. . ."

THE TRIAL COURT'S DECISION ON THE 20 CONSOLIDATED CASES ON JULY 3, 1975.

Judge Singleton's trial court decision, consisting of 5 parts, is reported in 404 Fed Supplement 33 and was filed one year and eight months after the first federal action was commenced. Parts 1 and 5 covered the introductory statement of facts and the conclusion, and parts 2, 3 and 4 each dealt with one of the cases which presented one of the challenges brought by each of the remaining cases. Part 2 discussed King Arts Theatre v. McCrea (CA-6-345) out of San Angelo, Tom Green County, and that plaintiff's claim that

article 4667 of Vernon's Annotated Civil Statutes was facially unconstitutional, and that Penal Code section 43.21 defining obscenity was unconstitutional. Part 3 discussed Richard Dexter v. Ted Butler, SA 74-CA-168 out of San Antonio Texas, Bexar County, and that plaintiff's claim that four successive seizures of the film "Deep Throat" and the 16 mm projector used to project the images, under four separate search warrants, was unconstitutional, and that the plaintiff's arrest on the first three occasions and charge with the "use of a criminal instrument", in violation of Penal Code section 16.01 (felony), was for purposes of harassment and in bad faith and without hope of obtaining a valid conviction. 5/ Part 4 discussed Ellwest Stereo Theatre Inc., v. Donald Byrd et al., CA-3-74-130-E

5/ Perhaps nowhere in the history of modern obscenity law is the frustration of law enforcement more poignantly expressed than in the record of Dexter v. Butler. In late 1963, District Attorney Butler of Bexar County was governed by the explicit search warrant procedures set forth in Penal Code Article 527 Section 9. (See Appendix E-). Those procedures required an adversary hearing before a search warrant could even be issued (sect. 9b, 9g), in which evidence was to be heard and a determination of probable cause made (section 9f). If "probable cause" was determined, a search warrant would issue (section 9g). Further within 10 days of the seizure, anyone claiming a right to possession could file a notice, alleging nonobscenity, and

(This footnote is continued on next page)

out of Dallas, Texas, Dallas County, and that plaintiff's claim that two successive seizures under search warrants issued by a justice

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have a hearing on the merits within one day of the request. On January 1, 1974, Article 527 section 9 was repealed and replaced by the general search warrant statute, Chapter 18 of the Code of Criminal Procedure (See Appendix C-1) which provided in part "18.02. A search warrant may be issued to search for and seize. . . (6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;" When "Deep Throat" invaded San Antonio in 1974, the same was seized under a search warrant which followed the same procedures which had previously been employed under Penal Code article 527. The issuing magistrate who viewed the film at the adversary hearing also authorized the seizure of the 16mm projector under the search warrant. Because a film print cannot be viewed without a projector, the issuing judge could have concluded that seizure was authorized by new article 18.02(2) and (9). See Appendix C-2. See also 404 F.Supp. 33 at 55 in the Ellwest Stereo Theater case reading: "It is obvious that article 18.02 (2) was written as a companion to section 16.01 of the new penal code which we dealt with above in the Dexter case." Should not the issuing magistrate have been asked for an authoritative state court interpretation?

A search warrant proceedings is nothing less than a separate judicial procedure in a state court, out of which a judicial order issues directing the applicant to go out and seize the specifically identified subject matter and hold it in the applicant's possession on behalf of, and pending further proceedings by the issuing magistrate.

The seized subject matter is considered to be in custodia lex. Under Texas Procedure, the person from whom the film had been taken, had the right within 10 days to have

of the peace pursuant to section 18.02(2) of the Texas Code of Criminal Procedure on January 24, 1974 (under which the police seized three films and three film projectors) and on January 29, 1974 (under which the police seized two films, two film projectors, two stools and two walls which formed two viewing booths) were unlawful as to the equipment and materials used for the exhibition. The court ruled for the plaintiff in all three cases.

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a hearing on the merits in such ancillary state court proceedings. Under Younger v. Harris 401 U.S. 37, it would appear that, since a State Court Judge had made a preliminary finding, Dexter should have been required to proceed in the state court on the merits before showing Deep Throat a second time. Are only prosecutors bound by Judicial Decisions after adversary hearings? If Dexter were so required, then a seizure under the second and subsequent search warrants was reasonable. See also Miranda v. Hicks, 422 U.S. 332. Judge Singleton thought otherwise, and held those attempts to be in bad faith, and the District Attorney liable for attorney fees. Bexar County District Attorney Butler's attempt to cut through this 6 year morass, using a direct appeal to this court, was unsuccessful. See Butler v. Dexter, 425 U.S. 262, 47 L.Ed.2d 74, 96 S.Ct. 1527. On a petition for writ of certioroi this past term, he was also unsuccessful. See Butler v. Dexter, No. 78-1428, petition for certiorari denied. 39 C.C.H. S.Ct. Bulletin at p. 3018. When District Attorney Butler was nominated for a federal judgeship, his appointment was blocked and defeated because of his law enforcement attempts to stop the exhibition of "Deep Throat" in San Antonio! It is worth commenting upon, in this note of frustration, that each and every state court judge in each state Supreme Court (8) which has considered the film "Deep Throat" on the merits, has held it to be obscene under state law.

THE TRIAL COURT'S DECISION IN THE LEAD CASE, KING ARTS THEATRE INC., v. MCCREA.

The facts in King Arts Theatre Inc., v. McCrea, are described by Judge Singleton in 404 F.Supp. at p. 38 as follows:

> "King Arts Theatre, Inc., was operating an adults-only, enclosed motion picture theatre in San Angelo, Texas. The theater showed sexually explicit films. On October 30, 1973, the landlord, from whom the theater building was rented, notified King Arts Theatre, Inc., that, at the suggestion of George E. McCrea, the county attorney of San Angelo, he was terminating the lease of the building as of November 15, 1973. The notice further informed the plaintiff that McCrea had contacted the landlord and told him that he intended to bring an application for an injunction to abate the theater as a public nuisance in order to prohibit the future showing of allegedly pornographic motion pictures.
>
> Plaintiff filed suit on November 12, 1973, requesting a declaratory judgment and injunctive relief. By agreement all parties have determined that the status quo will be maintained until the determination of this case."

The July 3, 1975 decision held that the inconveniences a prosecution of the nuisance statute would bring, did not constitute irreparable injury, and denied injunctive relief on that ground.

On the claim for declaratory relief, the Court held that the Texas Penal Code definition

of obscenity in Article 43.21 was not unconstitutionally vague, overbroad, or invalid because it failed to give adequate notice.

As to the claim for declaratory relief against the public nuisance statute, article 4667, the court held article 4667(a)(3) to be unconstitutional on its face for the following reasons: (1) Article 4667(a)(3) had to be considered with its companion statute article 4666, because that was the only statute under which a public nuisance action could be brought, inasmuch as the former section which authorized a public nuisance action, Penal Code article 527 section 13, had been repeated. The Court thereafter held the "closure" provision and alternative "bond" provision of Article 4666 constituted an unlawful prior restraint, because such operated to prevent the showing of motion pictures that have not been determined to be obscene.

The Court also held the statute failed to provide the "procedural safeguards" set forth in Freedman v. Maryland, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 because, under the Texas injunction procedures, a preliminary injunction could be issued on probable cause, and there was no specific provision for a swift final adjudication on the merits of the obscenity question thereafter. Judge Singleton specifically dis-

agreed with the validity of the injunction granted in Richards v. Texas, supra, which authorized the issuance of an injunction against the future exhibition of unnamed obscene films that depicted the particular patently offensive acts enumerated in the Texas obscenity statute. See 404 Fed. Supp. at 44.

THE FIRST COURT OF APPEALS' DECISION (3 JUDGES) ON SEPTEMBER 28, 1977.

Two years and 2 months later, the Court of Appeals, in a 2-1 split vote, decided the appeals in two of the above cases Universal Amusements Co., Inc., v. Vance, Dexter v. Butler and Southland Theatres Inc., v. Butler, 559 F.2d 128 (September 28, 1977). The majority opinion, written by Justice Gee and concurred in by Chief Judge Markey, was divided into three parts. Part 1 discussed Kings Arts Theatre Inc., v. McCrea, Part 2 discussed Dexter v. Butler, and Part 3 discussed the award of attorney's fees. The court, after noting that King Arts Theatre did not appeal the denial of the injunction or the decision on obscenity, reversed King Arts Theatre v. McCrea, but affirmed Dexter v. Butler.

THE FIRST COURT OF APPEALS' DECISION (3 JUDGES) IN KING ARTS THEATRE INC., v. MCCREA ON SEPTEMBER 28, 1977.

Judge Gee, with Chief Judge Markey concuring, disagreed with the district court's assessment of the state of the record; i.e., that the letter written by the landlord to the theater "was at the county attorney's suggestion." See 599 F.2d 1286 at 1289, footnote 2 reading:

> " . . . the letter states only that the termination was to avoid the inconvenience and embarrassment of joinder as a defendant in a suit to enjoin the showing of pornographic films. . ."

The majority of the Court stated as follows as to their authority to interpret the legislative intent regarding the closure and bond provisions of article 4666, and that article's relationship to article 4667(a)(3) at page 1290:

> ". . .We agree that closing a theater under article 4666 for all uses for one year - even ameliorated by the provision for reopening under bond - would pose serious first amendment questions. Such questions are not posed here, because we find article 4666's one-year closing remedy wholly inapplicable in actions such as this, since we read article 4667(a)(3)'s injunctive remedy as the exclusive procedure for abating obscene exhibitions as nuisances.
>
> We note first that apparently no reported Texas cases have applied - or discussed the application of - the one-year abatement to premises used for manufacturing,

distributing or exhibiting obscene material. We thus write on a clean slate and must determine how Texas courts would interpret these nuisance statutes. . ."

After noting that Article 4664 through 4667 had been on the statute books "since early in this century", the court proceeded to hold, as a matter of legislative interpretation, that article 4667, with the activities named therein, were not subject to the mandatory penalties of article 4666.[6/] The majority thereafter held that article 4667(a)(3)'s injunctive procedure was basically sound in its application to establishments such as King Arts Theatre, but authorized an injunction only.

The majority disagreed with the trial court's ruling regarding the "procedural safeguards" of the Texas injunctive procedures, and held them constitutional. The Court held that the Freedman v. Maryland, supra, reference to "final judicial determination" referred to determinations by an administrative board, not by a judicial body, and "does not condemn or even concern procedures as those of Texas

6/ Article 4667 had its derivation in the 1911 Texas Red Light Abatement Act which gave private citizens standing to abate houses of prostitution.

(and our) Courts by which temporary injunctions are granted or refused pending final hearings on the merits". 599 F.2d at 1293.

In his dissent, Judge Thornberry agreed with the trial court's ruling that article 4667 was facially invalid, and used strong language in dissenting from the majority's legislative interpretation that articles 4666 and 4667 were not to be read together, at page 1301 and 1302:

"In Part 1 of its opinion, the majority avoids what it admits to be 'serious first amendment questions' by creating legislative intent from non-existent legislative history and by taking an abstruse view of relevant Supreme Court cases. Because a plain reading of the applicable Texas statutes and of those cases calls for a result contary to that reached by the majority, I respectfully dissent. . ."

"In reversing the district court in King Arts Theatre, Inc., v. McCrea, the majority concludes that the one-year closing remedy provided in Article 4666 is inapplicable to obscenity and that the injunctive remedy under Article 4667 is 'the exclusive procedure for abating obscene exhibitions as nuisances.' Ante, at 1290. This strained interpretation ignores the plain language of the two statutes, and the majority is forced to support its conclusion with suppositions about what the Legislature may have intended (3/). . ."

"(fn3/) For example, the majority states that 'perhaps the legislature foresaw the constitutional implications . . . and to avoid potential trenching upon the first

amendment, chose to authorize only the lesser constraint of an injunction against future exhibitions of unprotected obscene matter . . . ." Ante at 1291. This is nothing more than conjecture, for as anyone familiar with Texas government is acutely aware, there is no such thing as a 'legislative history' for acts of the legislature."

THE COURT OF APPEALS' MAJORITY DECISION (EN BANC) IN KING ARTS THEATRE V. MCCREA ON DECEMBER 18, 1978.

One year and three months after the Court of Appeals filed its first opinion, the Fifth Circuit Court of Appeals (En Banc), in a split 8-6 vote, filed its decision in Universal Co., Inc., v. Vance and King Arts Theatre Inc., v. McCrea, 587 F.2d 159 (December 18, 1978). This time, Justice Thornberry, writing for the majority (Thornberry, Goldberg, Godbold, Clark, Roney, Hill, Fay and Rubin) reversed the three judge panel in which he had been a dissenting member and affirmed the judgment of the district court, but on a slightly different reasoning. The majority opinion, in four parts, discussed only King Arts Theatre v. McCrea.

Part 1 held that to subject the obscenity public nuisance portions of article 4667 to the "closure" and bond provision of article 4666 in accordance with the plain language

of the statutes, would render that section patently unconstitutional insofar as such pertain to obscenity. After noting that the Texas state courts had not examined the relationship between Articles 4666 and 4667, the majority construed the one-year closure remedy as inapplicable to obscenity, and held that the injunctive remedy provided in Article 4667 was the exclusive procedure for abating obscene eexhibitions as nuisances, arriving at the following result, at page 166:

". . .Thus, the one-year abatement procedure can be applied in cases of gambling, prostitution, and liquor law violations, all of which are defined as nuisances in Article 4664, but not in cases of obscenity, bull fighting, and live sex shows, which are covered only by Article 4667."

In part 2 of its opinion, the en banc majority considered the claim of King Arts Theatre that the injunction permitted by Article 4667(a)(3) was uncontitutionally deficient because the state, under the interpretation of Richards v. Texas and Locke v. Texas, can obtain an injunction that prohibits the future showing of various unnamed "obscene" films that depict particular acts enumerated in the state's obscenity statute. The en banc Court held article 4667(a)(3) to be unconstitutional "for it amounts to a prior restraint on materials not yet declared obscene.

587 F.2d at 169.

In part 3 of its opinion, the en banc court examined the claim that the "procedural safeguards" required by Freedman v. Maryland, supra, and held that Article 4667(a)(3) was unconstitutional in that regard also because:

> "The identical situation is present under the Texas injunction procedure, the hearing on the temporary injunction does not constitute an on-the-merits determination of obscenity, and there is no provision for a prompt review on the merits, and, while such a temporary injunction is in effect, the status quo is obviously altered - rather than maintained - and presumable protected speech is indefinitely suppressed."

In part 4 of its opinion, the Court held that King Arts Theatre was entitled to an award of costs and attorneys fees under 42 U.S. §1988 as the "prevailing party" and remanded the case to the district court with directions to set reasonable attorney's fees.

THE COURT OF APPEALS' MINORITY DECISION (EN BANC) IN KING ARTS THEATRE V. MCCREA ON DECEMBER 18, 1978.

The six dissenting judges (Gee, Brown, Coleman, Ainsworth, Tjoflat and Vance) agreed with the majority's legislative interpretation in Part I that articles 4666 and 4667 were not to be construed together, but dissented from parts 2 and 3 of that opinion.

In Part 2 of the dissent, the minority of the Court disagreed with the majority's holding that the injunction issued in Richards v. State, was improper. They viewed the flaw in the majority's reasoning as follows; 587 F.2d at 173:

> "In the first place, the majority's statement is simply incorrect: an injunction against exhibiting a film depicting enumerated acts from the obscenity statute suppresses that film not at all "because past films have been deemed offensive" but because the present film depicts the acts in a manner forbidden by the statute."

and that, if a criminal statute did not act as a "prior restraint" then an injunction against the same could not be so regarded, at page 174:

> "Thus if a statute forbidding publication of obscenity can be constitutionally valid, it is hard for me to see how an injunction doing the same thing is per se invalid. . ."

In Part 3 of the dissent, the minority disagreed with the majority's ruling that the Texas injunctive procedures lacked the procedural safeguards required by Freedman v. Maryland, on the ground that the Freedman safeguards referred to administrative restraints and had no application to judicial restraints. The minority pointed out that Texas Rules of Civil Procedure 680 and 681 were patterned after Federal Rule 65 and noted that the majority holding would invalidate the federal procedures in the obscenity context.

SUMMARY OF ARGUMENT

I

The suppression of nuisances which are injurious to public morality is among the most important duties of government. Article 4667(a)(3) of the civil statutes of Texas, which declares the habitual use of any place for the commercial manufacturing, commercial distribution, or commercial exhibition of obscene materials shall constitute a public nuisance which shall be enjoined at a suit of either the state or a citizen, is constitutional on its face.

Article 4667 does little more than codify the ancient Common Law Civil action to abate obscenity as a type of public nuisance. The one change that article 4667 does bring about, is to give standing to a private citizen to bring an action without being required to plead and prove "special injury."

II

Where a civil state statute is constitutional on its face and can be rendered constitutional by further interpretation by a state court, a federal court lacks jurisdiction to authoritatively construe the statute in the first instance.

Where a federal court usurps a state

court's right to construe state legislation and to function as an equity court, federal interference is jurisdictional. The narrow inquiry before the federal court is whether a state law is or can be rendered consistent with constitutional standards by further state court interpretation. For a plaintiff to succeed in challenging a state statute before a federal tribunal, he must successfully demonstrate to the federal court that no further interpretation could bring the state statute within the confines of the constitution.

The federal courts below refused to defer to the state judiciary for an "authoritative interpretation."

The Court of Appeals lacked jurisdiction in at least two instances: (1) as to the matter of legislative intent in enacting article 4667(a)(3), and the interaction of articles 4666 and 4667, and (2) the Texas equity procedures which might be available under Texas law, in the event that the Texas judiciary thought it necessary to expedite the hearing on the final injunction.

By assuming jurisdiction in the twenty cases below, the federal court has provoked a collision of principles. It was never intended that a state law enforcement officer, in the

performance of his governmental duties to carry out the abatement of moral public nuisances, should be subject to prosecution in the federal courts under the civil rights statutes, and required to pay attorney's fees to the persons responsible for the creation of the moral public nuisance.

Congress in 1871 never intended that the 1871 Civil Rights Act should be made a vehicle for converting the federal district court into a trial court for every case in which a pornographer raises a "free speech" defense in a state court action to suppress nuisances injurious to public health or morality. It was never the intent of congress that the 1871 Civil Rights Act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious discriminatory animus behind the conspiritors actions.

Sections 1985 and 1983 were enacted together as part of an integrated statutory scheme and must be read together. If it was never the intent of section 1985 to reach other than "racial, or perhaps otherwise class-based invidious discriminatory animus", then certainly the reach of 1983 is no broader and certainly does not justify making the federal district courts a trial court forum to litigate public

nuisance lawsuits, totally lacking in "racial" or "class-based invidious discriminatory animus." To construe the civil rights act as functioning differently in such a case, flies in the face of the policy related to the suppression of public nuisances, which was enunciated by the United States Supreme Court decision in Phalen v. Virginia (1850) at the time of the enactment of the Civil Rights Act.

Whatever may be the limits of "civil rights" jurisdiction, there is some point of "end" in the path where logic "seems" to point. U.S. v. 12-200 Foot Reels of Film. This court must weigh in the balance its past difficulties with federal interference in the obscenity and other areas of traditional state court activity during the past terms of court. Federal interference has caused an incredible logjam to this court's docket in the past, and federal interference in this case has effectively deprived the Texas equity courts of their jurisdiction to control moral public nuisances for six years.

III

Article 4667(a)(3) of the civil statutes of Texas is a valid application of the time-honored "nuisance" principal. The broad range of remedies which may issue out of a Texas court of equity under that principle are constitutional

as penalties for past unlawful conduct in the creation and maintenance of a place of business which is a per se moral public nuisance, and are not unconstitutional as a prior restraint because of their "chilling effect" on free speech generally.

The legal term "nuisance" embraces three different areas of the law and as many different kinds of remedies: (1) the criminal area with its remedy of the criminal penalties of fine, imprisonment, and forfeiture; (2) the civil "tort" area with its civil "damages" remedy, which awards compensatory damages for loss or harm suffered in person or property from the unlawful act, and both nominal and punitive damages where malice is also established; and (3) the equitable area with a host of equitable remedies against the "res" and persons in control thereof, such as injunction, constructive trust, destruction of the offending property and forfeiture.

In addition, a "nuisance" may be either (1) a private nuisance, (2) a public nuisance, or (3) both a private and a public nuisance, as in the case of a public nuisance which interferes with the enjoyment of land.

The law of nuisances began with the former type of redress- the private nuisance arising out

of an interest in real property. The purpose of the law was to reform the condition of the land. The Common Law remedy was limited strictly to interference with the use or enjoyment of land and was the parent of the law of private nuisance as advanced today. Paralleling the civil remedy protecting the rights on land, there developed an entirely separate principal based upon the rights of the general public in land. This principal developed as a criminal redress in a suit brought by the Crown. This "public" nuisance remained exclusively a criminal one until the sixteenth century, when it was recognized that a private individual who had suffered special damage might have a civil action in tort for the invasion of the public right.

There is a distinct difference between the concept of a civil action to abate a "private" nuisance arising out of one's ownership and real property, and the concept of a civil action to abate a "public" nuisance brought by a private person who suffers "special injury" from the public nuisance. In the former situation, the right is dependent upon one's private ownership and land, and arises out of damage to his interest in and rights arising out of the use of that land, whereas the latter orginates in a public right, is not dependent upon ownership and land

and need not consist of pecuniary damage or damage to real property, and may only consist of interference with the comfortable enjoyment of life and property.

From the earliest days of Anglo-Saxon law, a "moral" nuisance has been abatable as a public nuisance. Under the common law and the statutory law on nuisances for the state of Texas, the term "public nuisance" embraces both the "moral" public nuisance, such as the business and conduct of trading in obscenity which is offensive to the moral sense, and the "physical" public nuisance which is offensive to one of the five physical senses.

A "moral" nuisance is a "per se" public nuisance. The power to abate the same is inherent in government, which is under an obligation to remove the "moral" nuisance. This common law power to abate a public nuisance is one of the most basic powers of local government-the power possessed by municipal government in aid of its duty to protect the local community against that type of public conduct which is regarded as being malum in se. In the case of a "moral" public nuisance the obligation to remove the nuisance is limited only by the requirement that such abatement should be accomplished through the court process.

The historical background in the application of the "nuisance" concept and its remedies to the special "moral" public nuisance abatement statute involving a house of prostitution and its modern extension to a business dealing in obscenity warrants examination. The Texas Red Light Abatement Act was created in 1907, and was designed to remedy the problem of "lewdness" of a different type (but involving the same procedural problems as in the case of the obscenity "moral" nuisance). Although the 1907 Common Law Bawdy or Disorderly House "Moral" Nuisance could have been proceeded against under the Common Law and law enforcement authority regarding general public nuisances, there was little liklihood that the results which would be reached under that general statute would be consistent, or that the ends which were sought after could be uniformly achieved. The need for a special Red Light Abatement statute and remedy which would produce consistent and uniform results, was uniformly felt throughout the nation.

Today forty-one of the fifty states have a statute which employs the "Red Light Abatement" pattern of enforcement against "bawdy houses". The historical development of this type of statute has been in 3 directions: (1) a few states use statutory language which is clearly limited

to houses of prostitution and which could not be interpreted to include any form of obscenity; (2) ten states have adopted amendments and statutory language which specifically includes places dealing with obscenity in the operation of the statute; and (3) other states have used statutory language like "lewdness, assignation or prostitution" in which, by judicial decision, the term "lewdness" has been given a broad meaning, and as to which a further expansion of definition was sought which would include the "obscenity" moral nuisance. Other state have adopted special legislation on the subject, dealing specifically with the subject of obscene matter. Copies of such legislation is attached at Appendix A.

The nature and extent of the struggle by state law enforcement to reassert and reaffirm the common law public nuisance abatement approach to the "moral" nuisance of obscenity can be seen from the number of obscenity cases involving the public nuisance approach which have appeared upon the docket of the U.S. Supreme Court in recent years. (The public nuisance cases which have appeared upon the U.S. Supreme Court docket, 1972-1976 terms, are discussed herein at pages 72 through 81.) In addition the critical question as to whether or not the common law "moral" nuisance of obscenity can be reached either

through the term "lewdness" of the Red Light Abatement statutes or through the general public nuisance statutes, has become a burning issue in a number of other state cases.

The Court of Appeals below erroneously disregarded the memorandum decision of the U.S. Supreme Court in Art Theater Guild, Inc., et al., v. Ohio ex rel. Ewing, appeal dismissed for want of a substantial federal question. A review of the Ohio Supreme Court decision in Art Theater Guild, Inc., clearly shows that an order closing a theater which exhibited a single obscene motion film for a substantial period of time is constitutionally valid, at least where a good faith owner could obtain a release by (a) appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the court that he would prevent the nuisance from being reestablished (where the "nuisance" is regarded as being the exhibition of the particular film declared to be obscene).

The Court of Appeals opinion below holds that, under no circumstances, may a preliminary injunction or padlock penalty be issued. That result does not follow from any of this Court's decisions. It is one thing to say that an activity is "presumptively protected." It is an entirely different matter to say that the

presumption is conclusive.

An Equity Court has inherent power to enjoin the exhibition of specific sexual acts performed in the context of commercial exploitation, independent of the Miller test. See Ohio ex rel. Keating v. A Film Entitled "Vixen".

It is a fallacy to apply a rule of law which states that under no circumstances may a preliminary inuunction or padlock provision be utilized against businesses which continuously exhibit lewd conduct. Sexual intercourse performed for commercial gain, whether performed in the park or simulated on the stage or screen is in itself a form of illegal conduct. Where defendants choose to pay others to perform such conduct as a vehicle for the expression of art, it has "brigaded" the communication with conduct completely, and has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.

There is no satisfactory distinction which

would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and live performances on the other. The presentation of either may fairly be described as indecent and equally injurious to public morals.

The Legislative interpretation given to articles 4666 and 4667 is patently in error. Statutes having the same objective must be read in pari materia. Since, under Pitman v. Texas, and Articles 4666 and 4667, the "closure", bond, and preliminary injunction remedies are imposed as an "in rem" judicial remedy against the real property, rather than an "in per personam" remedy against the person, no first amendment question is presented. The rationale employed in Cincinnati Properties Inc., et al., v. Leis et al. and People of the State of California ex rel. Hicks v. "Sarong Gals" supports this proposition. The rationale expressed in Marks v. Leis and the "Sarong Gals" case is further supported by tort law principles which authorize punitive damages where a tortfeasor is guilty of "malice" in maintaining the moral nuisance.

The restraints which may be applied under articles 4666 and 4667(a)(3) of the civil statutes of Texas are "Proper Restraints." They are not

"Prior Restraints." Articles 4666 and 4667(a)(3) of the statutes of Texas which provide special legislation for the abatement of the public nuisance of commercial obscenity meet the test set forth by this court in U.S. v. O'Brien.

ARGUMENT

I

ARTICLE 4667(a)(3) OF THE CIVIL STATUTES OF TEXAS WHICH DECLARES THE HABITUAL USE OF ANY PLACE FOR THE COMMERCIAL MANUFACTURING, COMMERCIAL DISTRIBUTION, OR COMMERCIAL EXHIBITION OF OBSCENE MATERIALS SHALL CONSTITUTE A PUBLIC NUISANCE WHICH SHALL BE ENJOINED AT A SUIT OF EITHER THE STATE OR A CITIZEN, IS CONSTITUTIONAL ON ITS FACE.

A. The Suppression Of Moral Public Nuisances Is Among The Most Important Duties Of A State Government.

For over 120 years this Court has recognized the principle that the suppression of nuisances which are injurious to public morality is among the most important duties of government. In James Phelan v. Commonwealth of Virgina, 12 L.Ed.2d 1030 (1850) this Court stated at page 1033:

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government . . . .
>
> "It is a principle of the Common Law, that the King cannot sanction a nuisance. . ."

B. Article 4667 Does Little More Than Codify The Ancient Common Law Civil Action To Abate Obscenity As A Type Of Public Nuisance.

With one exception, the enactment of article 4667(a)(3) on January 1, 1974 created no remedies which did not previously exist. Prior to the enactment of such legislation, the Court of Appeals in Richards v. Texas, 497 S.W.2d 770 had granted injunctive relief under Texas Penal Code Article 527 section 13. In justifying the power of a Court of Equity to act in such cases, the Court relied upon the common law power of a Court of Equity to grant injunctions to abate public nuisances. The one change that article 4667 did bring about, however, was to give standing to a private citizen to bring that action without being required to plead and prove "special injury." See Point III, infra, at p.49, for further discussion of this common law action and its modern application in the obscenity area.

II

WHERE A CIVIL STATE STATUTE IS CONSTITUTIONAL ON ITS FACE AND CAN BE RENDERED CONSTITUTIONAL BY FURTHER INTERPRETATION BY A STATE COURT, A PLAINTIFF HAS NO STANDING TO ATTACK THE SAME IN THE FEDERAL COURT ON CONSTITUTIONAL GROUNDS, AND A FEDERAL JUDGE LACKS JURISDICTION AUTHORITATIVELY TO CONSTRUE SUCH STATE LEGISLATION IN THE FIRST INSTANCE.

A. In Some Cases Federal Interference May Be Jurisdictional, As Where A Federal Court Usurpes A State Court's Right To Construe State Legislation And To Function As An Equity Court.

The Court in Stecher v. Askew, 432 F.Supp. 997 (June 7, 1977) gave expression to a principle of law which, it seems, is rarely paid attention to these days in federal court.

In the light of the Statement of Facts herein (See Statement of the Case at p.10) the Askew opinion seems particularly apposite, at page 999:

> "In determining whether plaintiff has succeeded at this task, we 'must take the statute as though it read precisely as the highest court of the State has interpreted it.' Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273, 60 S.Ct. 523, 525, 84 L.Ed. 744 (1940). Furthermore, 'we lack jurisdiction authoritatively to construe state legislation.' United States v. Thirty-Seven Photographs, 402 U.S. 363, 369, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). Thus we examine the Open Profanity Law as it has been interpreted in State v. Mayhew, 288 So.2d 243 (Fla. 1973). In that case the Florida Supreme Court stated that 'the language sought to be prohibited by Section 847.04, Florida Statutes, F.S.A., is that which would necessarily incite a breach of the peace.' Id. at 251. The narrow inquiry before us therefore is whether a state law prohibiting the use of 'profane, vulgar and indecent language in any public place or upon the private premises of another, so as

> to necessarily incite a breach of the peace,' is consistent with constitutional standards, or can be rendered consistent with them by further state court interpretation.
>
> ". . . For the plaintiff to succeed in this Court, he must successfully demonstrate that no further interpretation could bring this statute within the confines of the tests set out in Chaplinsky. In subsequent proceedings under this statute, however, there is absolutely no obstacle to the Florida courts' further defining the words 'necessarily incite a breach of the peace' which were incorporated into this statute by State v. Mayhew, 288 So.2d 243 (Fla.1973), as meaning 'words likely to cause an average addressee to fight.' Such construction would save the statute, and the plaintiff cannot demonstrate that the Florida courts will not so construe it." (Our emphasis).

In U.S. v. 37 Photographs, supra, 402 U.S. 363, 369, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971), this Court noted that the federal Courts "lack jurisdiction" authoritatively to construe legislation. Notwithstanding this rule as to jurisdication, which clearly precluded their ruling on the matter, see Point III (C) at p.84, the federal courts below did not defer to the state judiciary for an "authoritative interpretation," but elected themselves instead, to give the new legislation its first interpretation.

The Court of Appeals lacked jurisdiction in at least two instances: (1) as to the matter of legislative intent in enacting article 4667(a)(3),

and the interaction of articles 4666 and 4667, and (2) the Texas equity procedures which might be interpreted to be available under Texas law, in the event that the Texas judiciary thought it necessary to expedite the hearing on the final injunction. Cf. In re William Ward, 82 Cal.App.3d 981, 147 Cal.Rptr. 476 (July 20, 1978).

While a party can make a theoretical argument that the granting of temporary relief after a hearing on a preliminary injunction may ultimately result in an unlawful "prior restraint" because of conditions subsequent, he cannot use that argument where a court decides to consolidate the hearing on the preliminary injunction with the hearing on the final injunction, with the objective of granting full and immediate relief at the conclusion of the consolidated hearing. There is nothing in Texas law which would prevent a motion for a preliminary injunction, at the instance of either a plaintiff or a defendant, from being given an immediate "full blown" hearing by the trial judge, to defeat the former constitutional argument. On the contrary, it is a generally accepted principal of law that the State Courts are obliged to adapt their procedures so as to arrive at a Constitutional result. In Busch, the California Supreme Court noted, in this context, at page 336:

> "Furthermore, the United States Supreme Court recently emphasized within the foregoing context that courts have an obligation to construe statutes in such a way as to avoid serious constitutional doubts. . . ." (Our emphasis.)

and, at page 338:

> "We are obliged to construe and interpret legislation in a manner which will uphold its validity. (Citations). Thus, the courts have held that provision for a prior adversary hearing may be implied by law in otherwise silent statutory provisions."

See, for example, Rule 65(a)(2) of the Federal Rules of Civil Procedure,[7/] which provides for consolidating the hearing of an application for a preliminary injunction with the trial on the merits:

7/ Rule 65(a)(2):

> "CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. . . ."

The Advisory Committee's Notes make this observation:

> "SUBDIVISION (a)(2). This subdivision provides express authority for consolidating the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the trial proper. Repetition of

(This footnote is continued on next page)

Although it is recognized that the Texas statutes do not have the specific statutory language contained in Rule 65(a)(2) of the Federal Rule of Civil Procedure, Amicus submits that the authority which appears in the Federal Rules is a part of a Texas Equity Court's inherent power.

In view of the previous state court interpretations in Richards v. Texas, 516 S.W.2d 949 (December 3, 1974), the ruling of the federal courts below as to the validity of that type of injunction was not unauthorized under the rule expressed in U.S. v. 37 Photographs, supra. It would appear, however, from the factual record which is reflected in the opinions of the Court of Appeals below[8/] that such does not establish a

> evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases. . . . The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception." (Our emphasis.)

8/ See Statement of the Case, supra, at page 13.

"case or controversy" which would warrant an expression from the federal court. The trial facts do not demonstrate that the plaintiff below, Kings Arts Theatre Inc., has pleaded a cause of action upon which relief can be granted. See State Cinema of Pittsfield v. Ryan, 303 F.Supp. 579, affd. in 422 F2 1400 (March 27, 1970), cert. denied in State Cinema of Pittsfield Inc., v. Ryan, No. 318, 400 U.S. 850, 27 L.Ed.2d 87, 91 S.Ct. 51 (October 12, 1970).

B. By Assuming Jurisdiction In The 20 Cases Below, The Federal Courts Below Have Provoked A Collision Of Principles.

It was never intended that a state law enforcement officer, in the performance of his governmental duties to carry out the abatement of moral public nuisances, should be subject to prosecution in the federal courts under the civil rights statutes, and required to pay attorney fees to the persons responsible for the creation of the moral public nuisance.[9/]

9/ See footnote 5, supra. As Justice Rehnquist has recently noted in a California case involving the exclusionary rule: "While it is quite true that courts are not to be participants in 'dirty business', neither are they to be ethereal vestal virgins of another world."

By entertaining, "jurisdiction" in the 20 cases below, the federal courts have incited a collision between two basic powers.

Amicus submits that the legislative history, reviewed by this Court in Griffen v. Breckenridge, 403 U.S. 88, 29 L.Ed.2 388, 91 S.Ct. 1790 (June 7, 1971) surrounding the 1871 enactment, indicates that Congress in 1871 never intended the 1871 Civil Rights Act should be made a vehicle for converting the Federal District Court into a trial court for every case in which a pornographer raises a "free speech" defense in a state court action to suppress nuisances injurious to public health or morality.

This court cannot avoid the implications of its rationale in Griffen v. Breckenridge, 403 U.S. 88, 29 L.Ed.2d 338, 91 S.Ct. 1790 (June 7, 1971) where, in upholding federal jurisdiction under the conspiracy section of the Civil Rights Act of 1871, in the case of conspiracies of private individuals to deprive the plaintiffs of civil rights involving racial discrimination, (43 USC Sect. 1985) Justice Stewart was required to examine the congressional purpose behind such legislation and concluded that it was never the intent of Congress that the act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious dis-

criminatory animus behind the conspirators' actions, at page 348:

> "It is thus evident that all indicators - text, companion provisions, the legislative history - point unwaveringly to 1985(3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.' Id. at 485. The constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted supra, at 100, 29 L.Ed.2d, at 347. The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

Stewart grounded the 1971 decision upon three factors: (1) the plain language of 42 USC

Sect. 1985; (2) the statutory scheme of the 1871 Civil Rights Act, taken as a whole (42 USC Sect. 1983 and 1985) and (3) the legislative history of the Civil Rights legislation in 1871. In examining the plain language of Section 1985, Stewart noted the failure to include the same phrase "under color of law," used in Section 1983, and remarked at page 345:

> "Indeed, the failure to mention any such requisite can be viewed as an important indication of Congressional intent to speak in Section 1985(3) of all deprivation of 'equal protection of the laws' and 'equal privileges and immunities under the law,' whatever the source."

Analysing the statute further, he examined the Civil Rights legislation as a whole (Sections 1983 and 1985) and noted at page 346:

> "An element of the cause of action established by the first section, now 42 USC Sect. 1983, is that the deprivation complained of must have been inflicted under color of state law. To read any such requirement into section 1985(3) would thus deprive that section of all independent effect. . . .Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of that portion of section 1985(3) now before us, simply to duplicate the coverage of one or more of them. . ." (Our emphasis.)

Since Sections 1985 and 1983 were enacted together as part of an integrated statutory

scheme and must be read together, and if it was never the intent of Section 1985 to reach other than "racial, or perhaps otherwise class based, invidious discriminatory animus", then certainly the reach of Section 1983 is no broader and certainly does not justify making the federal district courts a trial court forum to litigate public nuisance lawsuits, lacking in racial or class based invidious discriminatory animus. Particularly must this be so, where, as in the case of suppression of public nuisances, an important governmental interest is being furthered and local government is attempting to discharge its historic responsibility to the community to maintain a healthy moral climate. To construe the Civil Rights Act as functioning differently in such a case flies in the face of a contrary policy enunciated by the United States Supreme Court in relation to the suppression of public nuisances, at the time of the enactment of the Civil Rights Act. See James Phalen v. Commonwealth of Virginia, supra.

In light of Phalen v. Commonwealth of Virginia, supra, the broad language of Justice Brennan's opinion in Steffel v. Thompson, 415 U.S. 452, 39 L.Ed.2d 505, 94 S.Ct. 1209, at page 517 and 518 (March 19, 1971) with it emphasis on "the great impulse of national feeling born of

the Civil War", cannot logically be read to authorize the type of federal interference indulged in here under the guise of an 1871 "Civil Rights Action". To so hold would abnegate powers flowing from the Bill of Rights and Tenth Amendment which reserve to the States "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States. . ."

This Court's ruling in Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 215 (June 19, 1972) did not hold that 42 U.S.C. Section 1983 embraces a civil rights action of the sort pleaded herein, i.e., against state officials for state action taken to abate as a public nuisance a business dealing in obscenity as a regular course of conduct. All that case decided was that the three-judge court below erred in its prefactory ruling in the abstract that the injunctive relief sought was unavailable since 42 U.S.C. Section 1983, under which that lawsuit was brought, was not an Act of Congress within the "expressly authorized" exception of the anti-injunction statute which would authorize a federal court to grant injunctive relief and stay proceedings in a state court. Nor did this Court consider in Mitchum, supra, whether the plaintiff in that action, did, in fact, state a cause of action under 42 U.S.C. Section 1983. See Farrell v. Joel, Jr., 437 F.2d 160 (2nd Circuit,

January 20, 1971), a civil rights case based upon 42 U.S.C. Section 1983 to review school administration practice, where Circuit Judge Feinberg, speaking for the 2nd Circuit (Lumbard, Feinberg, Clarie) noted at page 162:

> "Appellant assumes that his complaint states a viable action under the Civil Rights Act. 42 U.S.C. Section 1983, and its jurisdictional counterpart 28 U.S.C. Section 1343(3). It is a measure of the change in the law over the past decade that the defendants and the district court did not question this assumption. . . ." (Our emphasis.)

Whatever may be the limits of "civil rights" jurisdiction, there is some point of "end" in the path where logic "seems" to point. See U.S. v. 12-200 foot reels, 413 U.S. 123 at 127, 37 L.Ed.2d 500 at 505, 93 S.Ct. 2665 (June 21, 1973) this Court must weigh in the balance its past difficulties with federal interference in the obscenity and other areas of traditional state court activity during the past terms of court, which culminated in its rulings restricting federal interference in Atlantic Coast Line Railroad Co., v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 288, 26 L.Ed2d 234, 90 S.Ct. 1739 (June 8, 1970), during the 1969 October Term and in Younger v. Harris, supra, and other cases during the 1970 October Term. It would be a tragedy were this Court to forget

that such federal interference has caused an incredible logjam to this court's docket in the past, and to overlook the fact that the federal interference in this case has effectively deprived the Texas Equity Courts of their right to control moral public nuisances for 6 years.

III

ARTICLE 4667(a) (3) OF THE CIVIL STATUTES OF TEXAS IS A VALID APPLICATION OF THE TIME-HONORED "NUISANCE" PRINCIPLE. THE BROAD RANGE OF REMEDIES WHICH MAY ISSUE OUT OF A TEXAS COURT OF EQUITY UNDER THAT PRINCIPLE ARE CONSTITUTIONAL AS PENALTIES FOR PAST UNLAWFUL CONDUCT IN THE CREATION AND MAINTENANCE OF A PLACE OF BUSINESS WHICH IS A PER SE MORAL PUBLIC NUISANCE, AND ARE NOT UNCONSTITUTIONAL AS A PRIOR RESTRAINT BECAUSE OF THEIR "CHILLING EFFECT" ON FREE SPEECH GENERALLY.

A. An Overview Of The "Nuisance" Legal Concept.

The legal term "nuisance" embraces three different areas of the law and as many different kinds of remedies: (1) the criminal area with its remedy of the criminal penalties of fine, imprisonment, and forfeiture, (2) the civil "tort" area with its civil "damages" remedy which awards compensatory damages for loss or harm suffered in person or property from the unlawful act, and both nominal and punitive damages where "malice" is also established, and (3) the equitable area with a host of equitable remedies against the "res" and persons in control thereof, such as injunction, constructive trust, destruction of the offending property and forfeiture. See, for example, 41 Tex.Jur.2d "Nuisances" §59 in general; Remedies available at

page 624; §65 Suits in Equity at page 631; §77 Action for Damages at page 654; §84 Criminal Prosecution at page 665.

In addition, a "nuisance" may be either (1) a private nuisance, (2) a public nuisance, or (3) both a private and a public nuisance, as in the case of a public nuisance which interferes with the enjoyment of land.

1. The Historical Development of The Cause of Action Abating A Private Nuisance And The Cause of Action Abating A Public Nuisance.

Historically, the law of nuisances began with the former type of redress - the private nuisance arising out of an interest in real property. Prosser on Torts (3d Edition) at page 593. The assize of nuisance, which was a criminal writ affording incidental civil relief, was designed to cover invasions of the plaintiff's land due to conduct wholly on the land of the defendant. Its purpose was to reform the condition of the land. This was replaced by the action on the case for nuisance, which became the sole common law action. The common law remedy was limited strictly to interference with the use or enjoyment of land and was the parent of the law of private nuisance as advanced today.

Paralleling this civil remedy protecting the rights on land, there developed an entirely

separate principle, based upon the rights of the general public in land (such as encroachments on public easements). This principle developed as a criminal redress in a suit brought by the Crown - "This came to include obstructed highways, lotteries, unlicensed stage plays, common scolds, and a host of other rag ends of the law." Newark, The Boundaries of Nuisance, 1949, 65 L.Q. Rev. 480, 482. By degrees, the public offense was greatly enlarged until it came to include "any act not warranted by law, or omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty's subjects." Stephen, General View of the Criminal Law of England, 1890 at 105. See, for example, former Texas Penal Law Article 695, which appeared in Title 12 Public Health, chapter one, Acts Injurious to Health, reading:

"Article 695. Nuisances.

> Whoever shall carry on any trade, business or occupation injurious to the health of those who reside in the vicinity, or suffer any substance which has that effect to remain on premises in his possession, shall be fined not less than ten nor more than one hundred dollars. Each day is a separate offense." (Our emphasis.)

This "public" nuisance remained exclusively a criminal one until the 16th Century, when it was recognized that a private individual who had

suffered special damage might have a civil action in tort for the invasion of the public right. Prosser on Torts (3d Edition) at page 593. 41 Texas Jur.2d §7 Public and Private Nuisances at pages 580-582.

2. A Comparison: Cause Of Action Abating A Private Nuisance Versus Cause Of Action Abating A Public Nuisance On A Showing Of "Special Injury".

There is a distinct difference between the concept of a civil action to abate a "private" nuisance arising out of one's ownership in real property, and the concept of a civil action to abate a "public" nuisance brought by a private person who suffers "special injury" from the public nuisance. In the former situation, the right is dependent upon one's private ownership in land, and arises out of damage to his interest in and rights arising out of the use of that land, whereas the latter originates in a public right, is not dependent upon ownership in land and need not (but in special cases may) consist of pecuniary damage or damage to real property, and may only consist of interference with the comfortable enjoyment of life and property. In the case of a civil action brought by a private person to abate a "public" nuisance, the pleading requirement that "special injury" be alleged, introduces the additional problem of establishing "standing

to sue" in such cases. See 41 Tex.Jur.2d §70 Persons Entitled to Relief at pages 642-644.

3. Under The Common Law And The Statutory Law On "Nuisances" For The State Of Texas, The Term "Public Nuisance" Embraces Both The "Moral" Public Nuisance, Such As The Business And Conduct Of Trading In Obscenity Which Is Offensive To The Moral Sense, And The "Physical" Public Nuisance Which Is Offensive To One Of The 5 Physical Senses.

From the earliest days of Anglo-Saxon law, a "moral" nuisance has been abatable as a public nuisance. At common law, trading in obscenity was a "moral" public nuisance. See H.G. Wood, The Law of Nuisances, section 57, at page 77 and section 65 at page 85:

> "57. Indecent exposure of one's person in public place, a public nuisance - As has previously been stated, anything that is offensive to the morals of society, or that is indecent, is a public nuisance. Therefore, any indecent exposure of one's person in a public place, in the presence of several persons, is a public nuisance, and indictable and punishable as such at common law. It is a nuisance because it shocks the moral sensibilities, outrages decency, and is offensive to those feelings of chastity that people of ordinary respectability entertain. . . ."
>
> "65. Selling obscene picture books etc. Common nuisance - So, too, all obscene pictures, prints, books or devices are common nuisances, and any person having

them in his or her possession for the purpose of exhibition or sale may be indicted therefor at common law, because they are clearly in derogation of public morals and common decency." 10/

This common law rule as to certain moral public nuisances has been codified in Vernon's Civil Statutes of Texas, articles 4664-4668.

4. A "Moral" Nuisance Is A "Per Se" Public Nuisance. The Power To Abate The Same Is Inherent In Government, Which Is Under An Obligation To Remove The "Moral" Nuisance.

This common law power to abate a public nuisance is regarded as one of the most basic powers of local government - the power possessed by municipal government in aid of its duty to protect the local community against that type of public conduct which is regarded as being malum in se. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Wood describes the danger as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H.G. Wood, Sections 23 and 24, at pages 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that

10/ Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless, 2 S and R (Penn) 91; 7 Am. Dec. 632.

they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency."

"Section 24. Wrongs malum in se. - This class of nuisances are of that aggravated class of wrongs, that being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

The power to abate a per se public nuisance is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law and basic civil rights inherent in individuals, rather than from

"express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Wood, Section 743, at page 972:

> "Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any person injured thereby. The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

An explanation of Wood's comment that the power to abate such nuisances within the corporate limits of a city is inherent in the people within the city appears in "The Law of Municipal Corporations", by McQuillin, Vol. 2, at §4.82. "Inherent right of local self-government" at p. 145:

> "Distinction should be made between the right of local self-government as inherent in the people, and the right as inherent in a municipal corporation; while as to the people, the right has quite commonly been assumed to exist, but as to the municipal corporation the right must be derived, either from the people through the constitution or from the legislature."

The intention to preserve and perpetuate the ancient right of people to local self-government is apparent throughout the scope of most of the state constitutions. As pointed out by McQuillin, supra, at page 150, footnote 89, where matters of local or municipal concerns are involved, the right of local self-government is basic.

One way of explaining this governmental right recognizes that when a special power, such as nuisance abatement, is conferred upon a city for municipal purposes, and where the moral public nuisance is within the territorial limits of a city, it becomes a "municipal affair" for that city rather than a "state" affair. — See "The Law of Municipal Corporations", supra, at page 163:

> "In short, legislative control over municipalities often depends on whether the subject matter involved relates to something of purely local concern, herein generally referred to as a municipal affair or to something in which the public at large outside the municipality are concerned, herein generally referred to as a state affair." McQuillin, supra, at page 141.

See also Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 436, 93 S.Ct. 2607 and Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 614, 94 S.Ct. 2887 (June 24, 1974), which adopted "local community standards" as the constitutional test for the factual determination of obscenity.

Joyce, in his treatise "Law of Nuisance", Section 345, points out that, under the common law power, the municipal corporation not only has the right, but it also has the obligation to remove the public nuisance; at page 498:

> "The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitutuion."

In the case of a "moral" public nuisance the obligation to remove the nuisance is limited only by the requirement that such abatement should be accomplished through the court process. See "The Law of Nuisances" by H.G. Wood, Section 32, "What nuisances are only abatable by the courts" at page 53; see also "Law of Nuisances" by Joseph

A. Joyce at page 507.

More than a century ago, this Court pointed out in James Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . ."
>
> "It is a principle of the common law, that the king cannot sanction a nuisance. . . ."

Where a nuisance affects the morals of the community, this Court has stated that the jurisdiction of the Equity Court to deal with the same is "salutory." Mugler v. Kansas, 123 U.S. 205 (Dec. 5, 1887). In Mugler, supra, this Court specifically held that Equity Courts do have the power to enter summary interlocutory "abatement" orders in proper cases. There, a petition had been filed in the Kansas State Court under the thirteenth section of a statute asking (1) that a group of buildings, constituting the brewery of the defendants, be adjudged a common nuisance, and the sheriff directed to shut up and abate the same, and (2) that the defendants be enjoined from using the premises. The petition was thereafter removed to the federal court and dismissed on the grounds that the "closure" remedy violated due process. On appeal, the U.S. Supreme Court reversed, holding at page 214:

"Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . . In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.' 2 Story, Eq. §§921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. <u>They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future;</u> whereas, courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. <u>This is a salutory jurisdiction, especially where a nuisance affects the health, morals, or safety of the community.</u> Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury." (Cites omitted.)

"As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits

in equity brought to abate a public nuisance. The statutory direction that an injunction issue at the commencement of the action is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit. The court is not to issue an injunction simply because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was, not whether a place, kept and maintained for purposes forbidden by the statute, was, per se, a nuisance -- that fact being conclusively determined by the statute itself -- but whether the place in question was so kept and maintained. If the proof upon that point is not full or sufficient, the court can refuse an injunction, or postpone action until the State first obtains the verdict of a jury in her favor. . . ." (Our emphasis.)

B. The Historical Background In The Application Of The "Nuisance" Concept And Its Remedies To The <u>Special</u> "Moral" Public Nuisance Abatement Statute Involving A House Of Prostitution (1907 Red Light Abatement Statute) <u>And Its Modern Extension</u> To A Business Dealing In Obscenity.

Consider the following hypothetical situation: Suppose that, over a short and continuous period of time, Jurisdiction "A" filed a succession of nine*/ different criminal complaints against an activity, alleging that on each of those nine

*/ <u>Richards v. Texas</u> involved 9 films. See Statement of the Case at page 10.

occasions the operators of such business had aided and abetted in acts of prostitution which occurred on the premises and that, after each criminal charge a criminal trial had taken place and the defendant had been found guilty as charged. Can there be any doubt that, under general principles of law, with or without benefit of statute, a Prosecuting attorney in that jurisdiction could successfully state a civil cause of action, alleging that the repeated and continuing illegal conduct of business at that address constituted a moral public nuisance which should be abated? Certainly, in such case, an equity court could make a finding that such repeated illegal conduct at that address constituted a moral public nuisance, and upon a further finding that such condition was continuing and presently existed, could authorize that the same be closed as a public nuisance. Having found the public nuisance to be presently in being, an equity court would be authorized to lay down the conditions upon which the activity might remain in operation, one of which could be that the errant party show to the satisfaction of the court that the public nuisance no longer existed? In such a case, where the proof shows that by reason of sufficient happenings, the premises have taken on the character of the acts therein committed, the premises can be

abated as a moral nuisance. See Pitman et al. v. Texas, 234 S.W.2d 436 (Oct. 26, 1956) interpreting Article 4667, as basically an action in rem to abate the place itself; at page 438:

> "The emergency clause incorporated in S.B.No. 176 of the 29th Legislature which discloses the purpose of the enactment of Article 4667, Sec. 1, reads: 'The fact that there is no adequate remedy to suppress gaming houses in this state creates an emergency and an imperative necessity that constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted.'
>
> "The foregoing declaration of purpose or intent with the employment in the article of the language '* * * use of any premises' classifies such an action, as here, as basically an action in rem, that is, to abate the use of a place, premises or building for gaming.
>
> "This article contemplates an action against a building, place or premises, in a sense, a condemnation of such where it is being used for gaming. The intent may be compared to an action to padlock certain premises, which universally are, and should be, pointed or singled out by some descriptive data to support an action for contempt of court."

Add an additional factor for a new hypothetical. Suppose that in the above Jurisdiction "A", the legal process for getting criminal matters to trial and for getting such criminal trials finalized has been rendered inoperative for any

of a number of reasons. May Jurisdiction "A" circumvent the criminal trial pitfall and select, in the first instance, as the primary law enforcement tool against a "moral" nuisance, the civil action to abate the premises as a moral public nuisance, alleging and proving in that single trial a course of continuing illegal conduct by establishing as evidence the acts which comprise the alleged criminal violations and illegal course of conduct, asking that Equity step in and render assistance? Justice Keith, speaking for the Court of Civil Appeals in Richards v. Texas, 497 S.W.2d 770 (July 2, 1973) answered that question in the affirmative at page 780:

> "The trial court was confronted with an unchallenged record showing that the defendants, over a long period of time, had sold and exhibited obscene and pornographic films in violation of a valid criminal statute. Obviously the cumbersome process of seizing and condemning each particular film when exhibited would take all of the time of one district judge, a justice of the peace standing by to issue search warrants and hold preliminary hearings, as well as a corps of police officers and assistant district attorneys.
>
> Chief Justice Burger said in Slaton, supra, (U.S. at , 93 S.Ct. at 2633): 'It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material.' Historically,

> in other areas of the law than pornography, equity has been able to fashion the remedies necessary to the public welfare. Thus, if we liken defendants' conduct to that of a public nuisance, there would be no obstacle to equity enjoining its continuance. See the long line of cases cited in Lowe, 6 Texas Practice, Remedies §33, p. 61 (2d Ed. 1973). We are unwilling to hold that there is no method which can be found to stop conduct of parties such as shown by our record.
>
> "The decree is specific, definite, and clear. The defendants do not even need a dictionary to learn what is prohibited since the parenthetical material following the Latin-derived words makes the order clear. The decree, being based upon a valid statute, should be upheld, if possible. We modify, and affirm, this section of the decree, doing so under what we consider to be the explicit holding of Miller, supra. . . ."

The Texas Red Light Abatement Act of 1907, (Acts 1907, p. 246) was created in just such an atmosphere. At that time in history, "lewdness" of a different type (but involving the same procedural problems as in the case of the obscenity "moral" nuisance) was plaguing society. Although the 1907 common law bawdy or disorderly house "moral" nuisance could have been proceeded against under the common law law enforcement authority regarding general public nuisances, there was little likelihood that the results which would be reached under that general statute would be

consistent, or that the ends which were sought after could be uniformly achieved. The need for a special Red Light Abatement Statute and remedy along the lines which were approved by the U.S. Supreme Court in Mugler v. Kansas, supra, and which would produce consistent and uniform results, was uniformly felt throughout the nation. See 20 Columbia Law Review at 604, which traces in part the history of such special legislation:

> "'Red Light' Injunction and Abatement Acts - The strong arm of equity has lately found increasing employment through the enactment in thirty-eight states of 'Red Light' laws for the abatement of disorderly houses. Modelled upon the liquor laws which originated in Iowa, these laws owe their enactment to the inadequacy of criminal prosecutions; and accordingly permit any citizen of the county wherein the nuisance exists to bring his civil action to enjoin and abate it. The effectiveness of the legislation lies in stringent provisions for abatement and in penalties for contempt.
>
> "This is clearly police legislation, designed to protect the public health and morals rather than to provide a remedy for injury to private property. For instance, the injunction is made binding upon the defendants throughout the jurisdiction of the court and frequently throughout the entire state. Not only are the costs of the action made a lien upon the premises; but in many states a 'tax' or fine is levied when the final injunction is issued. . . ."

1. The Extension Of The General Public Nuisance Statutes And Special Red Light Abatement Statutes To Include Businesses Dealing In Obscenity.

When the business of dealing solely in obscenity became so wide-spread in the early 1970's, with the introduction of the porno theater and porno book store and the same inadequacy of criminal prosecutions being felt in that area, one legislative reaction was to look to the solution which was found in the Red Light Abatement Statutes, viewing the common law "obscenity" moral nuisance as being of the same class or order as the common law "bawdy house" moral nuisance. Viewing the problem in the light of its historical background, it seems clear that those parallels are properly drawn and that the same type of legislation, from a constitutional standpoint, can be applied to the subject matter. In Kingsley Book, Inc. v. Brown, 354 U.S. 436, Justice Frankfurter, writing for the majority court, supplies the following answer at page 441:

> "We need not linger over the suggestion that something can be drawn out of the due process clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this court thus to limit the state in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or

by a qui tam action, or by an injunction or by some or all of these remedies in combination is a matter within the legislature's range of choice (citation). If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to treat with such books as deodands of old, or both, with due regard of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. . . ." (Our emphasis.)

The terms "qui tam action" and "deodand", referred to by Justice Frankfurter, are defined in Black's Law Dictionary, Revised, 4th Edition, as:

"QUI TAM. Lat. 'Who as well . . ." An action brought by an informer under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution, is called a 'qui tam action'; because the plaintiff states that he sues as well for the state as for himself. See In Re Barker, 56 Vt. 14; Grover v. Morris, 73 N.Y. 478."

"DEODAND (L.Lat. DEO dandum, a thing to be given to God) in English law. Any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the Crown to be applied to pious uses, and distributed in alms by the High Almoner. 1 Hale, P.C. 419; Fleta, Lib. 1, C25; 1 Bl. Comm. 300; 2 Steth. Comm. 365. See Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54, LRA 1916F, 935."

Today, forty-one of the 50 states have a statute which employs the "Red Light Abatement" pattern of enforcement against "bawdy houses". The historical development of this type of statute has been in three directions: (1) a few states, like Missouri, use statutory language which is clearly limited to houses of prostitution and which could not be interpreted to include any form of obscenity (M.R.S. section 563.130); (2) ten states have adopted amendments and statutory language which specifically includes places dealing with obscenity in the operation of the statute, (these states are: Delaware Article 10, Chapter 72 of the Delaware Code added in 1974 to include places dealing in obscene motion pictures and books; Idaho, Title 52, Chapter 1 and 4, as added in 1976; Indiana, Section 9-2711 of the Indiana Code, added in 1973 to include places dealing with lewd, indecent, lascivious or obscene films; Kansas, Article 39 K.S.A. Section 22-3901, added in 1970 makes "promoting obscenity" a common nuisance and subject to the Red Light type abatement procedures; Louisiana, amended Title 13 L.R.S. of 1950, Section 4711 to include maintainance of obscenity as defined by the penal laws in the definition of nuisance; Nebraska, enacted Legislative Bill 815 in 1974 which provides in Section 15 that a

place dealing in obscene films is a nuisance; Ohio, the definition of nuisance in O.R.S. 3767.01 et seq., enacted in 1961, has served as a model for other states expansion of their Red Light Abatement statutes; Tennessee, Section 23-301 of the Tennessee Code Annotated, amended in 1973 to include a place dealing in obscene films as being within the definition of a place of lewdness; Texas, articles 4664 and 4667 of the Texas Penal Code, effective January 1, 1974 specifically provide for the enjoining of the use of a premises for purposes of "commercial obscenity"; (3) other states, like Alabama, California, and Michigan have used statutory language like "lewdness, assignation or prostitution" in which, by judicial decision, the term "lewdness" had been given a broad meaning, and as to which a further expansion of definition was sought which would include the "obscenity" moral nuisance.

Other states have adopted special legislation on the subject. Prior to 1976, Idaho was the only state in the Union which had separately identified the "moral" public nuisance as such. See Idaho Statutes, Section 52-103, as added to the Idaho Codes in 1915. In 1976, the Idaho State Legislature amended its provisions on the abatement of moral public nuisances to incorporate the provisions of the Ohio Red Light Abatement Statute

which had recently been considered by the United States Supreme Court in Art Theatre Guild, Inc. et al. v. Ohio ex rel. Ewing, and to deal specifically with the subject of obscene matter. Similarly, Washington, North Carolina and Arizona have adopted special legislation, based upon the approach used by the Idaho Legislature. Title 52, Chapters 1 and 4, Idaho Code, Title 7, Chapter 7.48, Revised Code of Washington; Chapter 19, North Carolina General Statutes; Chapter 7, Article 1.1, Arizona Revised Code. A copy of those statutes is attached to this brief at Appendix A.

Because questions relative to statutory history have supplied considerable grist for the mill in the interpretation of public nuisance abatement legislation, see the tortuous language of Justice Tobriner's dissent in People ex rel. Busch et al. v. Projection Room Theater et al., 17 Cal.3d 42, 64, 130 Cal.Rptr. 328, 341 et seq. (June 1, 1976), the history of the development of those cases has considerable relevance in this appeal. The nature and extent of the struggle by state law enforcement to reassert and reaffirm the common law public nuisance abatement approach to the "moral" nuisance of obscenity (porno theaters, porno book stores and porno films) can be seen from the number of obscenity cases involving the public nuisance approach which

have appeared upon the docket of the U.S. Supreme Court in recent years.

2. Public Nuisance Cases Which Have Appeared Upon The U.S. Supreme Court Docket, 1972-1976 Terms.

1972 October Term

(1) Grove Press, Inc. v. Flask, (Film "I Am Curious (Yellow)" held to be a public nuisance in Youngstown, Ohio under Ohio Public Nuisance Statute - a Federal Civil Rights Action), 326 F.Supp. 574, (Mar. 10, 1970), vacated and remanded in Grove Press, Inc. v. Flask, (70-1) 413 U.S. 902, 37 L.Ed.2d 1013, 93 S.Ct. 3026 (June 25, 1973).

(2) A Motion Picture Film Entitled "Vixen" v. Ohio ex rel. Keating, (Film "Vixen" held by Ohio Supreme Court to be a public nuisance in Cincinnati, Ohio under Ohio Public Nuisance Statutes) 27 Ohio St.2d 278, 56 Ohio Ops.2d 165, 272 N.E.2d 139, vacated and remanded in A Motion Picture Film Entitled "Vixen" v. Ohio ex rel. Keating, (71-599), 413 U.S. 905, 37 L.Ed.2d 1016, 93 S.Ct. 3033 (June 25, 1973).

(3) Gulf States Theatres of Louisiana Inc. v. Louisiana ("The Stewardesses" held by Louisiana Supreme Court to be a public nuisance in Shreveport, Louisiana under Louisiana Public Nuisance Statute), 264 La. 44, 270 So.2d 547 (Dec. 18, 1972) vacated and remanded in Gulf States Theatres of Louisiana

Inc. v. Louisiana (72-1221), 413 U.S. 913, 37 L.Ed.2d 1036, 93 S.Ct. 3063 (June 25, 1973). 11/

(4) Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio, et al. v. U.S. District Court for the Northern District of Ohio, Western Division, et al. (Motion picture theater continuous course of conduct -- 16 films in a two-month period. Held, by trial court, to be a public nuisance in Lima, Ohio under Ohio public nuisance statute and the theater closed on a final injunction. Closure of the theater enjoined by a three-judge federal district court

11/Thus far, this Court has refused to accept this issue for its full consideration. The uncertainty which is developing as a result of this Court's inaction is pointed up by the final result reached in Gulf States Theatres of Louisiana, Inc. v. Louisiana, supra. In its original opinion in 270 So.2d 547, the Louisiana Supreme Court by a 4-3 vote had upheld the Louisiana Red Light Abatement Act, its application to the film "The Stewardesses", and the "padlock" penalty. When the U.S. Supreme Court remanded all of the obscenity cases, following its ruling on June 21, 1973 in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, a change of membership had taken place on the Louisiana Supreme Court and, upon remand the new 4-3 majority of that court which was balanced in a different direction as to whether obscenity should be suppressed, declared both the Louisiana obscenity laws and the Red Light Abatement Act's obscenity application to be invalid. A major authority in support of the public nuisance concept suddenly became a major authority against its application. See 287 So.2d 496, supra, (Dec. 3, 1973).

and padlock provision held to be unconstitutional), (No. 72-1613), Application for stay or writ of injunction denied in 413 U.S. 918, 37 L.Ed.2d 1039, 93 S.Ct. 3068 (June 25, 1973).

1973 October Term

(1) Speight T/A Harem Book Store v. Slaton (Porno Book Store. 3-judge federal district court (2-1) refused to interfere with a state civil action to abate a porno book store as a public nuisance under Georgia statute which made a violation of a criminal statute a public nuisance), 356 F.Supp. 1101 (Feb. 22, 1973). Probable jurisdiction noted in Speight et al. T/A Harem Book Store v. Slaton etc., et al., (No. 72-1557) 414 U.S. 815, 38 L. Ed.2d 48, 94 S.Ct. 129 (Oct. 9, 1973), vacated and remanded in Speight T/A Harem Book Store et al. v. Slaton etc., et al., (No. 72-1557) 415 U.S. 333, 39 L.Ed.2d 367, 94 S.Ct. 1098 (Feb. 27, 1974), following decision by the Georgia Supreme Court in Sanders v. Georgia, 203 S.E.2d 153 (Jan. 28, 1974) that the sale of 3 obscene magazines did not make the premises a public nuisance.

(2) Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd. (Motion picture theater continuous course of conduct — 16 films in a two-month period. Held to be a public nuisance in Lima, Ohio under

Ohio Public Nuisance Statute and the theater closed on a final injunction. Closure of theater enjoined by a three-judge federal district court and padlock provision held to be unconstitutional) (No. 73-296). Probable jurisdiction noted and set for oral argument in tandem with No. 73-1119 in 415 U.S. 974, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974).

(3) MIM, Inc. et al. v. William J. Baxley etc., et al., (Motion picture theater course of conduct. 3-judge federal district court refused to entertain a civil rights complaint to enjoin enforcement of a state court temporary injunction which closed the theater under Alabama Red Light Abatement Law) (No. 73-1119). Probable jurisdiction noted and set for oral argument in tandem with No. 73-296 in 415 U.S. 975, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974).

(4) Louisiana et al. v. Gulf States Theatres of Louisiana, Inc. et al. (Film "The Stewardesses". On remand of No. 72-1221, new 4-3 majority of Louisiana Supreme Court held the obscenity definition and the criminal ordinance unconstitutional and reversed prior judgment under nuisance abatement statute) 287 So.2d 496 (Dec. 3, 1973), petition for writ of certiorari denied in Louisiana et al. v. Gulf States Theatres of Louisiana, Inc. et al., (No. 73-1458) 417 U.S. 911, 41 L.Ed.2d 215,

94 S.Ct. 2610 (May 28, 1974).

1974 October Term

(1) Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd. (Motion picture theater continuous course of conduct — 16 films in a two-month period) (No. 73-296), vacated and remanded in Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd., 420 U.S. 592, 43 L.Ed. 2d 482, 95 S.Ct. 1200 (Mar. 18, 1975).

(2) MIM, Inc. et al. v. Baxley, etc. et al. (Motion Picture Theater course of conduct (No. 73-1119)). This Court avoided the issue, holding that it was without jurisdiction to consider the direct appeal, since the 3-judge court did not reach the merits of the attack on the Alabama Red Light Abatement Statute. Vacated and remanded in MIM, Inc., et al., v. Baxley, etc., et al., 420 U.S. 799, 43 L.Ed.2d 636, 95 S.Ct. 1278 (Mar. 25, 1975).

(3) Art Theater Guild, Inc., et al. v. Ohio ex rel. Ewing (Film "Without A Stitch" held by Ohio Supreme Court to be a public nuisance (Toledo) under the Ohio Red Light Abatement Statute. Closure provision applied) 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974), appeal dismissed for want of a substantial federal question in Art Theater Guild Inc., et al., v. Ohio ex

rel. Ewing (No. 73-1973) 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975).

(4) Marks et al. v. Leis (Book Store. 3-judge federal district court upheld constitutionality of Ohio Red Light Abatement Statute as being applied to a porno book store) (unreported), vacated and remanded in Marks et al. v. Leis (No. 74-793) 421 U.S. 940, 44 L.Ed.2d 96, 95 S.Ct. 1669 (Apr. 28, 1975).

(5) Art Theater Guild, Inc. et al., v. Ohio ex rel. Schoen (Film "The Stewardesses" and "History of a Blue Movie" held by Ohio Supreme Court to be a public nuisance in Toledo, Ohio under the Ohio Red Light Abatement Statute (public nuisance statute)) (unreported), appeal dismissed for failure to file a timely notice of appeal in Art Theater Guild, Inc. et al. v. Ohio ex rel. Schoen (No. 74-955) 421 U.S. 957, 44 L.Ed. 2d 445, 95 S.Ct. 1944 (May 12, 1975).

(6) Art Theater Guild, Inc. et al. v. Ohio ex rel. Robert J. Anderson (Film "Deep Throat" held by Ohio Supreme Court to be a public nuisance in Toledo under the Ohio Red Light Abatement Statute) (unreported) appeal dismissed for failure to file a timely notice of appeal in Art Theater Guild, Inc., et al. v. Ohio ex rel. Robert J. Anderson (No. 74-956) 421 U.S. 957, 44 L.Ed.2d 445, 95 S.Ct. 1944 (May 12, 1975).

1975 October Term

(1) Nihiser v. Sendak, 405 F.Supp. 482 (June 9, 1974) (Film "Deep Throat". Civil Rights action against Attorney General to enjoin use of public nuisance statute.) (N.D. Ind. Nov. 14, 1974) (No. 74-1165) vacated and remanded in Sendak, etc., v. Nihiser, dba Movieland Drive-In Theater, 423 U.S. 976, 46 L.Ed.2d, 96 S.Ct. 378 (Nov. 17, 1975).

(2) California ex rel. Camil v. Buena Vista Cinema et al., No. C-107347 (unreported) (Civil action to abate theater based upon course of conduct of exhibiting 85 porno films in 17-month period under city abatement ordinance); petition for writ of certiorari to review trial court's refusal to hear case on merits, pending decision of California Supreme Court in Busch et al. v. Projection Room Theater et al. (infra), denied in Camil, City Attorney of Duarte v. Superior Court, No. 75-820, 424 U.S. 943, 47 L.Ed.2d 348, 96 S. Ct. 1410 (Mar. 1, 1976).

(3) Alabama ex rel. Sweeton v. General Corporation et al., (Motion picture theater continuous course of conduct - 8 films in 5-week period. Theater closed by trial court after trial on merits.) Alabama Supreme Court held Alabama Red Light Abatement Act did apply, but that closure of theater was unconstitutional in 294 Ala. 657,

320 So.2d 668 (Sept. 18, 1975); petition for writ of certiorari denied in Sweeton, Chief of Police of City of Huntsville v. General Corporation, No. 75-1011, 425 U.S. 905, 47 L.Ed.2d 753, 96 S.Ct. 1494 (Mar. 29, 1976).

(4) Commonwealth of Pennsylvania v. MacDonald (Complaint in Equity to abate "Deep Throat" and "Devil in Miss Jones" as a public nuisance under the Crimes Code and Red Light Abatement Act.) Pennsylvania Supreme Court held criminal definition of obscenity inadequate under Miller v. California and therefore civil action did not lie.) 464 Penn. 435, 347 A.2d 290, (Oct. 30, 1975); petition for writ of certiorari denied in Pennsylvania v. MacDonald, No. 75-1073, 429 U.S. 816, 50 L.Ed.2d 75, 97 S.Ct. 57 (Oct. 4, 1976).

1976 October Term

(1) People ex rel. Busch v. Projection Room Theater et al., 16 Cal.3d 360, 128 Cal.Rptr. 229 (Mar. 4, 1976) (Consolidated civil action to abate porno theaters and porno book stores for continuous course of conduct.) California Supreme Court held Red Light Abatement Act did not apply but that General Public Nuisance Statute did apply and left open the question of closure "since the U.S. Supreme Court has not yet spoken on this difficult question"; Opinion vacated and

replaced by opinion in 17 Cal.3d 42, 130 Cal.Rptr. 328 (June 1, 1976) holding to same effect except that closure provision was held, in dictum, to be unconstitutional; Petition for writ of certiorari denied in Van de Kamp, as District Attorney v. Projection Room Theater et al., No. 76-340, 428 U.S. 922, 50 L.Ed.2d 289, 97 S.Ct. 320 (Nov. 1, 1976).

(2) Sendak v. Nihiser dba Movieland Drive-In Theater affirmed in Sendak v. Nihiser dba Movieland Drive-In Theater, No. 76-675, 431 U.S. 961, 53 L.Ed.2d 1057, 97 S.Ct. 1057 (June 13, 1977).

(3) People ex rel. Camil, City Attorney of Duarte, California v. Buena Vista Cinema et al. (Complaint in Equity to abate a theater as a public nuisance under California Civil Code sections 3479 and 3480.) Petition for writ of certiorari to review the refusal of the trial court to grant relief after a hearing on a preliminary injunction and evidence showing a course of conduct of showing 200 pornographic films in a 2-year period, denied in California ex rel. Camil v. Superior Court (Buena Vista Cinema, real party in interest), No. 76-887, 429 U.S. 1097, 51 L.Ed.2d 544, 97 S.Ct. 1114 (Feb. 22, 1977). Compare the opposite result recently reached in In Re William Ward, 82 Cal.App.3d 974, 147 Cal.Rptr. 476 (July 20, 1978).

(4) Harmer et al. v. Motion Picture Film Entitled "The Devil in Miss Jones" (Complaint in Equity by private citizens to abate a pornographic film showing at a local theater as a public nuisance under California Civil Code sections 3479, 3480 and 3495.) Petition for writ of certiorari, to review decision of state court denying standing to bring action to abate film, denied in Harmer v. Motion Picture Film Entitled "The Devil in Miss Jones", No. 76-1110, 430 U.S. 967, 52 L.Ed.2d 359, 97 S.Ct. 1649 (Apr. 18, 1977).

(5) Harmer et al. v. Motion Picture Film Entitled "Deep Throat" (Complaint in Equity by private citizens to abate a pornographic film showing at a local theater as a public nuisance under California Civil Code sections 3479, 3480 and 3495.) Petition for writ of certiorari, to review decision of state court denying standing to bring action to abate film, denied in Harmer v. Motion Picture Film Entitled "Deep Throat", No. 76-1522, 432 U.S. 907, 53 L.Ed.2d 1079, 97 S.Ct. 2952 (June 20, 1977).

3. Other State Cases In Which The Common Law "Moral" Nuisance Of Obscenity Has Been Attacked By The General Public Nuisance Statute Or The Special Red Light Abatement Statute.

In addition to the above litigation which has gone all of the way to the U.S. Supreme Court,

the critical question as to whether or not the common law "moral" nuisance of obscenity can be reached either through the term "lewdness" of the Red Light Abatement Statutes or through the general public nuisance statutes as in People ex rel. Busch (supra), has become a burning issue in a number of other state cases.

In State of Michigan ex rel. Cahalan v. Diversified Theatrical et al., 229 N.W.2d 389 (Mar. 4, 1975) the Court of Appeals upheld the trial court ruling that the exhibition of the pornographic films "The Devil in Miss Jones", "It Happened in Hollywood", "Deep Throat" and "Little Sisters" did constitute "lewdness" under the Michigan Red Light Abatement Statute. The Michigan Supreme Court reversed that ruling, holding that the statute was not meant to apply, in 396 Mich. 244, 240 N.W.2d 460 (Apr. 1, 1976).

In State of Oklahoma ex rel. Field v. Hess dba Venus Book Mart, the trial court held that the sale of a book and 2 magazines on July 11, 1973, 2 magazines on July 18, 1973, and the exhibition of a film in a coin-operated machine on July 18, and July 19, 1973 did constitute a public nuisance under the general public nuisance statute, 50 O.S. 1971, sections 1, 2 and 8, and granted a permanent injunction enjoining the operation of the business. The Oklahoma Supreme Court

upheld the application of the general public nuisance statute to the transactions in question, but held the permanent injunction issued against the operation of the business to be too sweeping, and modified that portion of the judgment.

In the State of Texas, the attempt to develop controls against obscenity through the public nuisance statutes was frustrated by the action taken by the 3-judge federal district court below. In Universal Amusements Co. Inc. et al. v. Carol Vance et al., in the U.S. District Court for the Southern District of Texas, Houston Division, 404 F.Supp. 33 (June 3, 1975), a 3-judge court (Singleton, Ingraham and Taylor) consolidated 20 obscenity cases which included several public nuisance abatement actions. In King Arts Theater, plaintiff challenged the facial constitutionality of Article 4666, Vernon's Annotated Civil Statutes (providing for the abatement of public nuisances, and specifically, the inclusion, as a nuisance, of premises used for the purposes of commercial obscenity). The court disagreed with the conclusion of the Texas state court in Richards v. State, 497 S.W.2d 770, concerning the application of an injunction to movie houses. In a declaratory judgment, Article 4667(3) considered with articles 4665 and 4666 was held unconstitutional on its face. In the federal district court's

opinion, it operated as an invalid prior restraint on first amendment rights of those who commercially manufacture, distribute, or exhibit materials which may be thought by the state to be obscene but which have not yet been judicially determined to be obscene. On appeal, the Court of Appeals, 5th Cir. in Universal Amusement Co. et al. v. Vance et al. etc., (Sept. 28, 1977) reversed and construed the 1973 state statute differently, holding that the closure provision of the preceding section 4666 did not apply as a remedy in abating obscene exhibitions as nuisances and therefore that the nuisance provision, as thus construed, was constitutional. Later, that result was changed slightly by the Court of Appeals (en banc). The net result of such federal interference was to prevent public nuisance remedies from being developed in the State courts.

C. The Court Of Appeals Below Erroneously Disregarded The Memorandum Decision Of The U.S. Supreme Court In Art Theater Guild, Inc. et al. v. Ohio ex rel. Ewing ("Without A Stitch"). "Appeal Dismissed For Want Of A Substantial Federal Question."

In light of the background history of the "moral" public nuisance concept and the number of such public nuisance cases which have reached the docket of the U.S. Supreme Court in the past years, it is unreasonable to argue that this Court's brief memorandum decision in Art Theater

Guild Inc. et al. v. Ewing, 421 U.S. 923, 44 L.Ed. 2d 82, 95 S.Ct. 1649 (Apr. 21, 1975) should have no value as a precedent and should be treated as lightly as did the en banc court below. See 587 F.2d 159 at 165. The Art Theater Guild Inc. case is squarely in point as to the "closure" and bond provision in Article 4666. See Appendix D-1 to this brief.

In the Art Theater Guild Inc. case, this Court "dismissed for want of a substantial federal question" an appeal from the Ohio Supreme Court's decision in State ex rel. Ewing v. "Without A Stitch", 307 N.E.2d 911. Under Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281, 2289 (June 24, 1975), the Art Theater Guild Inc. decision was a ruling on the merits as to those issues which were decided by the State Court below. A review of the Ohio Supreme Court decision at page 917-918, clearly shows that an order closing a theater which exhibited a single obscene motion picture film for a substantial period of time is constitutionally valid, at least where a good faith owner could obtain a release by (a) appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the Court that he would prevent the nuisance from being reestablished (where the "nuisance" is regarded as

being the exhibition of the particular film declared to be obscene.)

In Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, the U.S. Supreme Court again had occasion to refer to the "closure" provision of the Ohio Statute. There, the Court noted at page 497, that the narrowing construction of the Ohio Supreme Court in Ohio ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch", supra, avoided the constitutional difficulty which concerned the U.S. District Court in the Huffman case, and, that the case did not fit "within the exception for statutes which are flagrantly and patently violative of express constitutional prohibitions.'" See also Huffman v. Pursue Ltd., supra, footnote 23 at 43 L.Ed.2d 497, which comments favorably upon the "closure" provision of the Ohio Red Light Abatement Statute, Ohio Rev. Code §3767.04 and §3767.06.

The Court of Appeals' opinion below holds that, under no circumstances, may a preliminary injunction or "padlock" penalty be issued. That result does not follow from any of this Court's decisions. It is one thing to say that an activity is "presumptively protected." It is an entirely different matter to say that the presumption is conclusive! The fallacy of applying such a rule

to businesses which continuously exhibit lewd "conduct" is logically demonstrated in the opinion of Associate Justice Burke, speaking for the majority of the New York Court of Appeals in Translux Dist. Corp. v. Bd. of Regents, 248 N.Y.S.2d 857 at 860 (Mar. 26, 1964).

> "If we can accept the obvious -- that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, with Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946.) 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it' (Douglas, J., dissenting in Roth v. United States, 354 U.S. 476, 514, 77 S.Ct. 1304, 1324, 1 L.Ed.2d 1498)."

Judge Burke's closing principle at page 863 is a fitting memorial which should be engraved upon any court's reply to such argument:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say

> that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films".

In Busch, supra, the California Supreme Court similarly found no basis for such a distinction in the case of obscene publications, at p. 332:

> ". . . (W)e discern no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and 'live' performances on the other. The presentation of either may fairly be described as 'indecent' and equally injurious to public morals. . . ."

The sexual conduct which is being portrayed on the motion picture screens across this nation in pornographic films like "Deep Throat" is the identical type of conduct that was proscribed as criminal in People v. Fixler, 56 Cal.App.3d 321, 128 Cal.Rptr. 363 at 365 (Mar. 17, 1976):

> "It seems self-evident that if A pays B to engage in sexual intercourse with C, then B is engaging in prostitution and that situation is not changed by the fact that A may stand by to observe the act or photograph it. A criminal act is not made any the less criminal by pictorial recordation of the act. (See People v. Zeihm, 40 Cal.App.3d 1085, 115 Cal.Rptr. 528)." (Our emphasis.)

Fixler is not an aberration in California law. See People v. Parker, 109 Cal.Rptr. 354 (Aug. 6,

1973) at page 358:

> ". . . We note at the outset that there is no evidence in the record before us which supports the conclusion that respondent's conduct in the instant case was "normal and natural and which is engaged in by a majority of adult citizens." The conduct referred to is that pertaining to the hiring and directing of professional performers to engage in acts of oral copulation in a semi-public place recorded by the camera for distribution to the general public through the media of the cinema. It is a reasonable inference that all involved including respondent expected to reap a financial return from the enterprise. The conduct of defendant may be defined as a form of commercial vice and not normal and natural sexual activity of consenting adults in private. Therefore we do not regard defendant's conduct as involving the exercise of a fundamental personal right protected by the Fourteenth Amendment."

See also, People v. Zeihm, 115 Cal.Rptr. 528, People v. American Art Enterprises, Inc., et al., 142 Cal.Rptr. 338 at 340 and Judge Hanson's discussion of Fixler at page 348-351.

There can be no question that the above-described type of public nuisance is regarded as a serious matter. Where the facts warrant, such unlawful conduct can be prosecuted under Penal Code Section 182 as a conspiracy (felony), which is a distinct offense from the misdemeanor obscenity crime described in Penal Code Section 311.2, People v. Haskin, 55 Cal.App.3d 231 at 242, 127 Cal.Rptr. 426, 433 (Mar. 3, 1976).

Three years ago, the application of the California public nuisance law to this type of criminal activity was made even clearer. See Weis v. Superior Court, 30 Cal.App. 730, 159 P. 465, cited with approval and applied to such conduct in motion picture films in People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42, 49-50, 130 Cal.Rptr. at 332:

> "In Weis v. Superior Court (1916) 30 Cal. App. 730, 159 P. 464, the Court of Appeal ruled that an attraction known as the 'Sultan's Harem,' conducted at the Panama-California International Exposition, constituted a public nuisance subject to abatement. This exhibition assertedly involved the 'indecent and offensive' exposure to members of the public of the 'naked persons and private parts thereof' of various female employees. Although such conduct also constituted the crime of indecent exposure (Pen. Code, §311), nevertheless the Weis court held that '(w)here, however, the threatened acts, if committed, in addition to being an indictable offense, will constitute a public nuisance, courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof. (Citations.)' (Weis at p. 732, 159 P. at p. 464.) Furthermore, the court, quoting from Wood on Nuisances (§68), stated that '"A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures, and any and all exhibitions, the

> natural tendency of which is to pander to vicious . . . and disorderly members of society."' (Ibid., italics added.)"
>
> "The foregoing Weis reasoning was approved by us more than 30 years ago in People v. Lim, (1941) 18 Cal.2d 872, 879, 118 P.2d 472. Lim involved the propriety of an injunction against gambling activities on the ground that they constituted a public nuisance. We upheld in Lim the use of the public nuisance injunctive remedy against gambling activity which, it was alleged, disturbed the public peace and corrupted public morals. In Lim we carefully traced the history of public nuisance actions and noted that 'The courts have . . . refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance' (P. 879, 118 P.2d p. 476.) Although, as we noted, such activities as gambling or usury do not fit comfortably within the above quoted statutory definition of public nuisance, in Lim we acknowledged that an 'indecent' exhibition such as was involved in Weis could be enjoined despite the concurrent application of the criminal statutes, since such exhibitions if determined to be indecent are expressly declared by section 370 to be public nuisances."
>
> "While carefully noting that Weis involved live dance performances, we discern no satisfactory distinction which would justify differential treatment of the pictorial representation in obscene magazines and films on the one hand, and 'live' performances on the other. The presentation of either may fairly be described as 'indecent' and equally injurious to public morals." (Our emphasis.)

In the case of public nuisances, an equity trial court has traditional equity jurisdiction to enter preliminary injunctions and summary interlocutory "Closure" orders in "proper" cases. Those trial courts ought not to be automatically ousted of their traditional equity jurisdiction by the mere voicing of a "free speech" claim. More succinctly, a First Amendment issue is not raised every time a piece of soiled toilet paper is exposed to view in the Courtroom.

It seems quite clear from the Art Theater Guild case that the starting point for an equity court's jurisdiction is that it does have jurisdiction to enter an injunction and apply a "closure" penalty for past conduct where the same film continues to be exhibited after a trial on the merits has resulted in an obscenity verdict, and a determination that a "moral" public nuisance does presently exist. It seems equally as logical that the extreme limits of that Equity Jurisdiction cannot be discussed in the abstract, but depend upon the particular set of facts and the manner in which the statute is applied and what is proper and suitable to those facts. It should be noted that the majority of the California Supreme Court made this very point in its ruling in Busch, at page 339:

> "We emphasize that the proceedings now before us remain at the pleading stage. Having determined that plaintiffs' complaint is sufficient to state a cause of action based upon a general nuisance theory, we consider it inappropriate to describe in detail the precise dimensions of the injunctive and other relief which might be suitable in this and the related cases. It is enough that the parties and the trial court recognize that substantial constitutional issues are presented in this litigation, and that care must be exercised to assure that defendants' constitutional rights are not infringed. More than this is not required." (Our emphasis.)

While the Busch court did discuss the injunctive and closure remedies, it was in reply to the defendants' contention that a public nuisance action could not lie under Civil Code Sections 3479 and 3480 because of the "prior restraint" implications of the injunctive remedy, and it was in the background of the mandatory penalties of the California Red Light Abatement Statute, which had no "escape" provisions, such as are found in Article 4666 of the Civil Statutes of Texas. In its analysis, the Busch Court distinguished the "specific" forms of relief of the special California Red Light Abatement Law under which the action was brought (whose penalties are mandatory) and pointed out, in contrast, the flexibility inherent in the general public nuisance statute and Equity Courts upon which it upheld the Complaint, at page 337:

> "In order properly to evaluate defendants' prior restraint contention, we first

review the possible forms of relief available to plaintiffs in an ordinary public nuisance action. The public nuisance statutes, unlike the Red Light Abatement Law, do not provide for such specific forms of relief as temporary and perpetual injunction (Pen. Code, §11226-11227), removal and sale of fixtures, and closure of the premises for one year (Pen. Code, §112230). Instead, the district attorney or city attorney is, in general terms, empowered to bring a civil action to 'abate' the public nuisance. (Code Civ. Procedure, §731.) Further, 'An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts of each case. . . .' (Italics added) Guttinger v. Calveras Cement Co. (1951) 105 Cal.App.2d 382, 390, 233 P.2d 914, 919; see generally McQuillin, Municipal Corporation §24.73.)"

The provisions of the California Red Light Abatement Statutes are but one expression of the inherent power of an Equity Court which are made mandatory by legislative directive. Ohio ex rel. Ewing v. "Without A Stitch", 307 N.E.2d 911, 917. While it is true that the California Supreme Court in Busch held that, as a matter of statutory construction, the California Red Light Abatement Statute was not meant to apply to obscene films, that Court also remarked, at page 340, that the legislative question was "not free from doubt." Compare Trans-lux Corporation v. State of Alabama ex rel. Sweeton, 366 So.2d 710 at 713 (Jan. 19, 1979) where the Alabama Supreme Court held differently regarding the matter of legislative

intent. The California Supreme Court in Busch, however, did not hold that the mandatory remedy of the Red Light Abatement Act, as interpreted by the Ohio Supreme Court in the Art Theater Guild, Inc. case, could not be adopted by a California Equity Court, in its discretion, in a "proper and suitable" case.

Amicus submits that the real concern of the majority of the Court in Busch and courts in other Red Light Abatement cases has been with the rigid strictures of the Red Light Abatement Statute, if such were to be applied automatically to cases involving legitimate First Amendment claims. Those apprehensions should not be felt where a specific statute compensates for such defects. All the Busch court was really saying was that it was foreclosing relief under the rigid California Red Light Abatement Act, which ousted the Equity Court of its traditional equity jurisdiction, and was authorizing the same abatement approach under the general public nuisance statute -- a result which allowed greater flexibility and more discretion in the trial judge. The Court's additional dictum in its second opinion on June 4, 1976, regarding cases which involved "legitimate" First Amendment claims, placed the focus in the wrong direction, and obscured the California Court's favorable citation of the two Ohio landmark cases, discussed hereafter,

which authorized the issuance of preliminary injunctions and closure orders in "proper" cases.

An examination of the McQuillin reference, Section 24.73 at pages 630-633, cited by the California Supreme Court in its analysis, provides no reason for believing that a preliminary injunction and closure would not be "proper and suitable" in California under other facts. The McQuillin text, which the Busch court referred to, points out at page 632 that:

> "The rule is otherwise as to businesses that are unlawful or inherently of potential menace to public order, safety, or morality, e.g., the operation of a gaming or disorderly house, which can be summarily abated by a municipality under resolution of the municipal legislative body. . . ."

Further, the Busch court noted at page 337:

> "Thus, in the matters before us if the trial court finds the subject matter obscene under prevailing law an injunctive order may be fashioned that is "proper and suitable" in each case. It is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing. (Paris Adult Theatre I v. Slaton, supra, 413 U.S. 49, 54-55, 93 S.Ct. 2628, 37 L.Ed.2d 446 (approving Georgia abatement procedure); Grove Press, Inc. v. Flask, supra, 326 F.Supp. 574, 579; New Rivieria Arts Theater v. State, supra, 412 S.W.2d 890, 893-895; State ex rel. Ewing v. "Without A Stitch", supra, 307 N.E.2d 911, 914; State ex rel. Little Beaver Theatre, Inc. v. Tobin, supra, 258 So.2d 30, 32; State ex rel. Keating v. Vixen, supra, 272 N.E.2d 137; see Commonwealth v. Guild Theatre, Inc. (1968) 432 Pa. 378, 248 A.2d 45; Grove Press, Inc. v. City of Philadelphia (3d Cir. 1969) 418 F. 2d 82, 90-91; Sanders v. State, supra, 203 S.E.2d 153, 156-157)."

On the preliminary injunction issue, the California Supreme Court has since held that a preliminary injunction can be granted in such cases. See In Re William Ward, 82 Cal.App.3d 974, 147 Cal.Rptr. 476 (July 20, 1978). Hearing denied October 12, 1978. Further, the very page of State ex rel. Ewing v. "Without A Stitch" which the Busch court cited with approval (p. 914) specifically states that a preliminary injunction can be granted under Ohio law. At page 914, the Ohio Supreme Court stated:

> "At this point, it should be noted that R.C. 3767.01, et seq., do not provide for or allow censorship of films prior to a judicial determination of obscenity. Therefore, the United States Supreme Court decisions such as Freedman v. Maryland (1965), 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, and Teitel Film Corp. v. Cusack (1968), 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966, which specify the constitutional requirements of such a system, are not applicable. Under R.C. 3767.01, et seq., the earliest point in time when the exhibition of a film may be enjoined is upon the granting of a temporary injunction. However, a temporary injunction can only be issued after a judicial hearing at which all the parties can present evidence on the allegation of obscenity." (Our emphasis.)

The Ohio Supreme Court in applying the "padlock" provision in State of Ohio ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 95, 307, N.E.2d, 911, 917 (Feb. 24, 1974) surmounted the "in personam" obstacle by simply holding the obvious -- that the release provisions do not require the owner to show that, in the future, no film which will be exhibited during the one-year period will be obscene. The operator is simply required to account for his past conduct and to demonstrate that the nuisance, in whatever form, has been abated.

Under the Ohio Statute, after an adverse decision in the trial court and the preliminary injunction is to issue the losing litigant has an option as operator and "the person owning, in control, or in charge of the nuisance so enjoined." He can show "to the satisfaction of the court or judge that the nuisance complained of is abated," in which case, the court is not required to close the place against its use for the "lewdness" which had been found to exist. Under the Statute, the theater cannot be shut down unless the trial judge is convinced from evidence that the public nuisance is continuing and presently exists. The same condition exists in Texas. See Pittman et al. v. Texas, supra, at page 439. If, for example, the public nuisance is found to exist solely on the basis of

a film, such as "I Am Curious (Yellow)", and such showing is not representative of the course of conduct normally experienced, then it could not reasonably be said that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing, having been "pulled" by a responsible exhibitor.

By admitting that under the above set of circumstances such a ruling is proper under the statute, it does not follow therefrom that such would be proper in all cases. The clear intent of the statute is otherwise. Where, for example, the proof were that the operator has exhibited hard-core programs over a long period of time, the trial judge would be warranted in refusing to rule that the operator had met his burden of going forward with sufficient evidence to establish "to the satisfaction of the court that the nuisance had been abated." The trial judge could properly conclude that to accept such testimony, under the proof offered, would be to perpetuate a fraud on the court. See People of the State of California ex rel. Hicks v. Sarong Gals, 42 Cal.App. 556, 561, 117 Cal.Rptr. 24, 27 (October 18, 1974) where the California court noted that once the public nuisance has been established, the "burden of presenting evidence" (not the "burden of proof") that the public nuisance

had been abated shifted to the defendant:

> "Appellants next contend that the order of abatement was invalid because the nuisance had been abated. In support of their contention, they argue that no evidence was presented to establish violations of lewd conduct or obscenity statutes after December 15, 1970. The contention is without merit."
>
> "In the first place, evidence was introduced at the trial reporting a performance at the Sarong Gals on or about January 3, 1973, less than two weeks before the trial date, from which the trial court could conclude that the nuisance was continuing."
>
> "In the second place, once the People presented evidence to show that lewd acts had taken place at the Sarong Gals, it was incumbent upon appellants to present evidence showing that the nuisance had been abated. (See People v. Goddard, 47 Cal.App. 730, 734; People v. Macy, 43 Cal.App. 479, 483; People v. Dillman, 37 Cal.App. 415, 419-420.) It is a maxim of jurisprudence that '(a) thing continues to exist as long as is usual with things of that nature." (Civ. Code, 3547).) Appellants' reliance on People v. Goddard, supra, is misplaced. In Goddard, there was clear and uncontradicted evidence to show that the persons occupying the premises for immoral purposes vacated the premises three days before the filing of the Complaint. No similar showing was made here."

D. An Equity Court Has Inherent Power To Enjoin The Exhibition Of Specific Sexual Acts Performed In The Context Of Commercial Exploitation, Independent Of The Miller Test.

The Texas injunction in Richards v. Texas, supra, and Locke v. Texas, did not go far enough.

An equity court has inherent power to enjoin the exhibition of specific sexual acts which are performed in the context of commercial exploitation, independent of any need to consider the Miller test. See Ohio ex rel. Keating v. A Motion Picture Film Entitled "Vixen", 27 Ohio St.2d 78, 272 N.E.2d 137 at 141 (July 31, 1971), adhered to upon remand in 35 Ohio St.2d 215, 301 N.E.2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

> "Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof 'for commercial exploitation rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose' is forbidden by Ohio law. Here, there is no dispute as to the fact that "Vixen" does depict numerous acts of purported sexual intercourse, and obviously it does so for a commercial purpose. No useful purpose could be served by remanding the cause to a lower court for consideration of the impact of those two statutes. We have the authority to 'render such judgment as * * * (the lower court) should have rendered.' Paragraph two of the syllabus in Peltz v. South Euclid (1967), 11 Ohio St. 2d 128, 228 N.E.2d 320, and paragraph three of the syllabus in Neil v. Neil (1883), 38 Ohio St. 558.
>
> "It follows that we have authority to render such judgment as the lower court would now be required to render, if the cause were remanded. Such authority is specifically given in Section 2(B)(1)(f), Article IV, Ohio Constitution.
>
> "Therefore, where scenes in a motion

picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those scenes are violative of R.C.§§2905.34 and 2905.35, constitute a 'nuisance' within the meaning of R.C. §3767.01, and their exhibition may be enjoined as provided in R.C.§3767.02 et seq.

"Insofar as it upholds the injunction against the exhibition of those portions of 'Vixen' which depict actual or purported acts of sexual intercourse, the judgment of the Court of Appeals is affirmed." (Our emphasis.)

Unless this Court so holds, the anomalous result described in Fixler, Zeihm, American Enterprise Inc. et al. and Haskin, discussed above, will continue unabated.

E. The Legislative Interpretation Given To Articles 4666 And 4667 Is Patently In Error. Statutes Having The Same Objective Must Be Read In Pari Materia.

What has happened in the Court of Appeals is obvious. In his dissent in the 3-judge decision on September 28, 1977, Judge Thornberry pointed out that "a plain reading of the applicable Texas statutes and of those cases calls for" Article 4666 and 4667(a)(3) to be read together and that to hold otherwise would arrive at a "strained interpretation of the two statutes." (Statement of Facts at page 29). Fifteen months later, but this time as the author of the en banc majority decision, Judge Thornberry, restated the same view (Statement of Facts at page 30) and then thereafter, refused to acknowledge that legislative intent.

The federal courts are bound by the decision of the Court of Civil Appeal in Pitman v. Texas, 234 S.W.2d 436 at 438 (October 26, 1950) which holds that article 4666 is a part of 4667:

"This article (4667) contemplates an action against a building, place or premises, in a sense, a condemnation of such where it is being used for gaming. The intent may be compared to an action to padlock certain premises, which universally are, and should be, pointed or singled out by some descriptive data to support an action for contempt of court. . ."

See also, Sutherland Statutory Construction, vol. 2A §51.03. Statutes having the same purpose or object are deemed to be in pari materia, at page 298; Texas v. Dyer, 145 Tex 568, 200 S.W.2d 813.

F. Since, Under Pitman v. Texas, And Articles 4666and 4667, The "Closure", Bond And Preliminary Injunction Remedies Are Imposed As An "In Rem" Judicial Remedy Against The Real Property, Rather Than An "In Personam" Remedy Against The Person, No First Amendment Question Is Presented.

Amicus submits that the proper construction of the "padlock" remedy of Article 4666 of the Civil Statutes of Texas is the rationale expressed in two recent decisions: (1) by the three-judge U.S. Federal District Court for the Southern District of Ohio, Western Division, in a case involving a book store, in Cincinnati Properties, Inc., et al., v. Leis et al., (unreported) (May 2, 1974), judgment vacated and remanded on other grounds in Marks v. Leis, 421 U.S. 940, 44 L.Ed.2d 96, 95 S.Ct. 1669 (April 28, 1975), and (2) by a majority of the Court of Appeal, Fourth District, Second Division, in a case involving "entertainment" in People ex rel. Hicks v. "Sarong Gals", 42 Cal.App.3d 556, 117 Cal.Rptr. 24 (October 18, 1974), hearing denied by the California Supreme Court on December 11, 1974.

(1) The Rational Employed in Cincinnati Properties Inc., et al., v. Leis et al.

In the Cincinnati Properties, Inc. case, supra, the Court was faced with the same issue which was presented in the Art Theater Guild case, except that there the three-judge Federal Court was considering an application of the "padlock" provisions of the Ohio Public Nuisance Statute, (O.R.C. sections 3767.01, et seq.) to an adult book store under the state trial court's interpretation that such constituted "lewdness" under the Red Light Abatement Statute. In upholding the "padlock" provision to that construction of the statute, that Court stated:

> "The plaintiffs' constitutional argument is this: A person is operating a bookstore containing a thousand different items each concedely presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. A state may, of course, in the exercise of its police powers, prohibit certain conduct. It is not questioned - whatever the difficulties of ascertainment - that the

states have power to prohibit obscenity and, within the Miller limits, to determine what is an is not. Kingsley v. Brown, 354 U.S. 436 (1967); United States v. Reidel, 402 U.S. 351 (1971); Miller v. California, 413 U.S. 15 (1973); Paris v. Slaton, 413 U.S. 49 (1973). Nor is it questioned that a state, having judicially determined that a given product is obscene, may validly enjoin the sale of that product by an individual, provide for its destruction and/or provide criminal sanction. The fallacy is in this sample example: A person possessing for sale one copy of one book concedely obscene and ten copies of a concedely non-obscene book is imprisoned for the former - during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely, it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials."

"From time immemorial states have chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a "nuisance". The attendant remedy provided in such nuisance cases has been one against the place in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the 'Inventory' involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment). No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity."

"The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental. As Mr. Justice Frankfurter said in Kingsley, at page 441, 'the phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test.' The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weightly learning to his support of constitutionally protected liberties:"

"'What is needed', writes Professor Paul A. Freund, 'is a pragmatic assessment of it operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.'"

"The constitutional power of the State to abate what has been appropriately defined as a public 'nuisance' has never been seriously questioned. 'Padlock' remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated. To quote again from Kingsley, at page 441, the Supreme Court,

speaking in the area of dissemination of pornography, said:

> 'It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. (underscoring ours.) Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice.'

"Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, 'All places where intoxicating liquors are . . . sold . . . are declared to be common nuisances and upon the judgment of any court . . . finding such place to be a nuisance under this section, the sheriff . . . shall be directed to shut up and abate such place . . .' The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality, said:

> 'The State, having authority to prohibit the . . . sale of intoxicating liquors . . . we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes . . . The statute does not put the brand

> of a common nuisance upon any place, unless . . . that place is kept and maintained for purposes declared by the legislature to be injurious to the community.'
> (underscoring ours.)

"The padlocking provision of the Ohio statute is a time honored remedy involving the place -- it is not censorship or prior restraint."

2. The Rationale Employed in People of the State of California ex rel. Hicks v. "Sarong Gals".

In People of the State of California ex rel. Hicks v. "Sarong Gals", supra, the Court of Appeal, Fourth Appellate District, was construing an application of the California Red Light Abatement Statute. There, the trial court permanently enjoined certain parties from "maintaining, using or occupying the premises known as "Sarong Gals" for the purpose of "lewdness" and had closed the premises to all use for one year. In affirming the permanent injunction, the Court of Appeal analyzed the "padlock" provision as an "in rem" rather than an "in personam" remedy and the principal objective, the reformation of the property itself, as follows:

> "Appellants finally contend that the abatement order is overbroad and impinges upon their First Amendment right to present non-lewd dancing exhibitions at the Sarong Gals. Of course, just

as a court order for the incarceration of a convicted lawbreaker impinges on all sorts of constitutional rights, so does the abatement order. The order shutting down the property except for limited uses is specifically authorized, however, by Penal Code, section 11230 which permits the 'closing of the (offending) building . . . against its use for any purpose . . . for a period of one year, . . .' The question is, therefore, not whether the order impinges on constitutionally guaranteed rights, but whether the statute constitutes a permissible exercise of the state's police power. (Cf. Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 530.)

"The purpose of Red Light Abatement proceedings is to abate a nuisance. Abatement of nuisances is a long established and well recognized exercise of the state's police power. (Board of Supervisors v. Simpson, 36 Cal.2d 671, 675; People v. Casa Co., 33 Cal.App. 194; People v. Barbiere, 33 Cal.App. 770, 775-776.) The provision in Penal Code, section 11230 authorizing closing of the offending property to all uses for a period of one year, while harsh, is constitutionally permissible. The Legislature could, and presumably did, consider the alternative of constant police surveillance of the offending premises too burdensome to the community. It is to be remembered that Red Light Abatement proceedings are directed against the offending property itself. Their purpose, it has been said, 'is to effect a reformation in the property itself.' (People v. Bayside Land Co., supra, 48 Cal.App. at p. 261.) Thus, while appellants are arguably denied

their right of First Amendment expression to some extent, they are denied such right only upon the specific property here involved and only for a limited period of time. They are in the meantime free to exercise their First Amendment rights at any other place. Moreover, appellants' restricted First Amendment rights are penumbral at best. The right to present non-lewd dancing for commercial purposes in a beer bar is hardly to be equated with the right to hold a town hall meeting (See Crownover v. Musick, supra, 9 Cal.3d at p. 414-426.) Thus, the interference with appellants' right to free expression is limited and easily overbalanced by the state's substantial interest in abating public nuisances." (Our emphasis.)

3. The Rationale Expressed in Marks v. Leis and the "Sarong Gals" case is further supported by tort law principles which authorize punitive damages where a tortfeaser is guilty of "malice" in maintaining the "moral" nuisance.

Further, as was stated at the outset, the public nuisance civil action embraces many different areas of the law and as many different kinds of remedies. The civil action is both an "at law" action under which both compensatory and punitive damages can be awarded, and an "equity" action, under which an injunction can be entered.

In ascertaining whether a punitive "closure" injunction may be proper as a penalty for past

conduct in maintaining a moral nuisance, it is useful to analyze and compare the remedies which are traditionally available in such "at law" and "equity" actions. Consider, for example, the hypothetical case of a wealthy tortfeasor who slant drills across adjacent property and takes oil at will from under neighboring property. In such a case, the injured landowner can sue in Equity for an injunction and at law for damages arising out of the tort (conversion). In those cases in which the superior position of the tortfeasor makes it impossible for the injured party to terminate a tortious invasion, done in reckless disregard for the injured party's rights, such as where the tortfeasor continues with such obvious tortious conduct, after notice, (malice) tort law permits the injured party, upon proper allegations of notice and malice, to seek punitive damages. The underlying theory for the imposition of punitive damages in such cases is to punish the tortfeasor for his past malicious conduct rather than compensate for the loss suffered by the injury party. In those cases where the evidence clearly demonstrates that the tortfeasor's conduct is malicious and cannot otherwise be halted, the jury is entitled to assess an extraordinary

amount of money as damages, to and including any amount which will assure the termination of the defendant's tortious conduct. Where the facts justify the penalty, he may even be put out of business.

Since it undeniably is proper under tort law to assess punitive damages in the nature of $600,000 to assure the termination of past malicious conduct which cannot otherwise be stopped under the law, Bertero v. National General Corporation, 13 Cal.3d 43, 65 118 Cal.Rptr. 184, 200 (Jan. 29, 1975), then certainly it should not be untoward for an Equity Court in a proper case to require a forfeiture of a leasehold interest in property (personalty) to effect the same result, where it is established to the satisfaction of the Equity Court, that the person in control of the moral public nuisance is guilty of "malice" in continuing to maintain such moral nuisance. See also 31 ALR3d 1346 "Punitive damages in actions based on nuisances".

G. The Restraints Which May Be Applied Under Articles 4666 and 4667(a)(3) Of The Civil Statutes Of Texas Are "Proper Restraints." They Are Not "Prior Restraints."

Not all restraints are evil. Freedom is not an absence of restraints. It is a composite of

systemized restraints. E. Barrett Prettyman, retired Chief Judge, U.S. Court of Appeals, phrased it thusly in a speech at Law Day observances, 1962, at the Pentagon (See Case and Comment, March-April 1963):

> "In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product of restraints; it is inherently a composite of restraints; it dies when restraints are withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systemized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem of the democratic process is not to strip men of restraints merely because they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive glob of faceless animations but as a perfect realization of each separate human mind, soul, and body; not in mute, motionless mediation but in flashing, thrashing activity."

The rationale of the Court of Appeals below, which held that the potential "closure" and bond penalties of Article 4666, and the potential preliminary injunction which could issue under the Texas injunction procedures were unlawful "prior restraints" on free speech applies the same "chilling effect" argument which has been

advanced, at some point, in almost every obscenity case from Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (December 14, 1959), to the present time. An appropriate (but rarely cited) response to that "chilling effect" argument was made by U.S. District Court Judge George C. Young, dissenting from a three-judge court decision in Russ Meyer, et al. v. T. Edward Austin State Attorney for the Fourth Judicial Circuit et al., 319 F.Supp. 457, 475 (July 23, 1970):

> "'Chilling' of First Amendment rights is, of course, proscribed by the Constitution. But obscenity does not have such protection and the 'chilling' of obscenity is not only permissible but a legitimate interest of the state. The majority opinion expresses concern over the finding that the state proceeding 'chilled' the rights of Vixen's promoters. But who can say from the record that such 'chilling' was not justified in the state's efforts to suppress obscenity?" (Our emphasis).

Amicus submits that the "chilling effect" argument is inapposite, and that U.S. District Court Judge Young's remarks on that "score" state the correct rule of law which should be applied generally in obscenity cases.

H. Articles 4666 and 4667(a)(3) Of The Statutes Of Texas Which Provide Special Legislation For The Abatement Of The Public Nuisance Of Commercial Obscenity Meet The Test Set Fourth By This Court In U.S. v. O'Brien.

The Historical Right Of Local Governments To Enact "Moral" Public Nuisance Abatement Legislation Justified Any Incidental Limitation On First Amendment Freedom (Chilling Effect) That May Occur.

In U.S. v. O'Brien, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (May 27, 1968), this Court laid down the following test where "speech" and "nonspeech" elements are combined in the same course of conduct, so as to draw in question the right of government to enact a law or regulation protecting a sufficiently important governmental interest (nonspeech) which may justify an incidental limitation on First Amendment (speech) freedoms. In O'Brien, supra, the Court stated at p. 376:

> "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' where the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms; compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to section 12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it."

In O'Brien, supra, this Court upheld a federal statute which penalized any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any" selective service registration certificate, as applied to O'Brien for his act of burning his registration certificate as "symbolic speech". The Court also upheld the constitutionality of the federal statute on its face as against a challenge that the purpose of Congress in enacting the amendment was "to suppress freedom of speech".

The historical right of governments to abate "moral" public nuisances, and the historical facts recited in the Statement of Facts herein

demonstrate that the four requirements set forth in U.S. v. O'Brien, supra, are met: (1) the regulation of "per se" moral public nuisances is within the constitutional powers of state government; (2) the abatement of a "per se" moral public nuisance is an indispensible part of government; (3) the governmental interest in the abatement of a business activity which, as a regular course of business, exhibits hard-core pornography, is clearly unrelated to the suppression of free speech, and (4) the remedies which are provided in Articles 4666 and 4667 are an incidental restriction on alleged First Amendment freedoms which is no greater than is essential to the furtherance of that interest in the light of the specific facts.

The Court of Appeals' contention that state government may not take action under its public nuisance abatement powers, in the manner provided for in the Texas statutes, because the same constitutues a "prior restraint" on free speech, fails to examine those governmental powers in the light of U.S. v. O'Brien, supra.

To accept the Court's broad general arguments re "prior restraint" would, as a practical matter, nullify the state government's time-honored powers to control such "per se" moral public

nuisances. It seems abundantly clear, however, that under the principles expressed in U.S. v. O'Brien, not every governmental action against an alleged moral public nuisance can be blindly attacked as a "prior restraint". Further, not every prior restraint (were such action to be interpreted as reaching the level of a "prior restraint") is an unlawful "prior restraint". As this Court stated in Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 at p.459:

> "Labelling respondents' action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional per se . . ."

For a state's regulation, regarding such matters, to approach the level of an illegal "prior restraint" it would have to approach the level of regulation which was found to exist in Southeastern Promotions Ltd. v. Conrad, supra, 420 U.S. 546.

The major point of distinction between the constitutional cases on "prior restraint" recited in Southeastern Promotions Ltd. v. Conrad, 428 U.S. pp. 552 et seq. and the state statute and procedure under consideration herein is that, there, the evil railed against was administrative action which had the effect

of suppressing free speech without providing access to a court and a speedy judicial contest. The constitutional safeguards set forth in those cases is repeated in Southeastern Promotions Ltd., supra, at p. 459:

> "The settled rule is that a system of prior restraints 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of censorship system'. Freedman v. Maryland, 380 U.S. 51, 58, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965). See United States v. Thirty-Seven Photographs, 402 U.S. 363, 367, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 419-421, 27 L.Ed.2d 498, 91 S.Ct. 423 (1971); Teitel Film Corporation v. Cusack, 390 U.S. 139, 141-142, 19 L.Ed.2d 966, 88 S.Ct. 754 (1968). See also Heller v. New York, 413 U.S. 483, 489-490, 37 L.Ed.2d 745, 93 S.Ct. 2789 (1973); Bantam Books, Inc. v. Sullivan, 372 U.S., at 70-71, 9 L.Ed.2d 584; Kingsley Books, Inc. v. Brown, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325 (1957). In Freedman the Court struck down a state's scheme for the licensing of motion pictures, holding 'that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint', 380 U.S., at 58, 13 L.Ed.2d 649. We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to a judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." (Our emphasis.)

Those infirmities do not exist here where the primary objective is to get the controversy into the Courts for an immediate determination on the merits.

The major point which distinguishes proper governmental action in such situations from the unlawful "prior restraint" context is set forth in Southeastern Promotions Ltd. at p. 459:

> "The presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law then to throttle them and all others beforehand . . ."

The further caviat of the Southeastern Promotions Ltd. case, also voiced at p. 459 reading:

> "In order to be held lawful, respondents' action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally

protected speech . . ."
is fully satisfied by the legislative provision which confronts this court.

Were this Court to accept the Court of Appeals' rationale that "prior restraint" is a factor to be reckoned with judicial proceedings because of the "chilling effect", that same argument could be applied with equal force to nullify any obscenity statute or ordinance which established a criminal penalty for the exhibition of an obscene film, and applied that criminal penalty after the violation had been established in a judicial contest. If the public nuisance action is to be regarded as a "prior restraint" because of its "chilling effect" on the appellee's conduct, why then would not also the enactment of an obscenity ordinance which precipitated an arrest for an obscenity violation constitute a "prior restraint" under the same principles? The latter argument has often been urged in the Courtroom but, thus far, has never succeeded. See, for example, the assessment of the trial court in State Cinema of Pittsfield Inc., v. Ryan, 303 F.Supp. 597, where a district attorney threatened seizure of the film and an arrest for violation of the State obscenity statute if the film "Vixen" were shown,

affirmed in State Cinema of Pittsfield Inc., v. Ryan, 422 F.2d 1400 (March 27, 1970), petition for writ of certiorari denied in 400 U.S. 850, 27 L.Ed.2d 87, 91 S.Ct. 51 (October 12, 1970).

Amicus submits that to accept the Court of Appeals rationale on "prior restraint" is to deny that an equity court has the inherent judicial power to deal with modern day equity problems. Further, a federal appellate decision which applies that rationale in a state case is unconstitutional, being an interference with the lawful equity powers of the state judicial system.

CONCLUSION

Wherefore, amicus curiae prays that this Honorable Court reverse the judgment of the Court of Appeals below and rule as follows:

1. Where a state statute is constitutional on its face, and can be rendered constitutional by further interpretation by a state court, a federal court lacks jurisdiction to construe such statute in the first instance. U.S. v. 37 Photographs, 402 U.S. 363, 369 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971)
2. Under ruling Texas decisions, articles 4666 and 4667 of the Civil Statutes of Texas are in pari materia and must be

construed together. Pitman v. Texas, 234 S.W.2d 436 at 438 (October 26, 1950).

3. The "closure" provision of article 4666 of the Civil Statutes of Texas is constitutional on its face. This holding is controlled by the U.S. Supreme Court decisions in Huffman v. Pursue Ltd., 420 U.S. 592 at 612, 43 L.Ed.2d 482 at 496, 95 S.Ct. 1200 (March 18, 1975) and the subsequent memorandum decision in Art Theater Guild Inc., et al., v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (April 21, 1975).

4. The restraints which may be applied under articles 4666 and 4667(a)(3) of the Civil Statutes of Texas and procedural statutes governing the issuance of injunctions are "judicial" restraints and, as such, are "proper" restraints. They do not come within the rule against "prior restraints" expressed in Freedman v. Maryland which applies to "administrative" restraints.

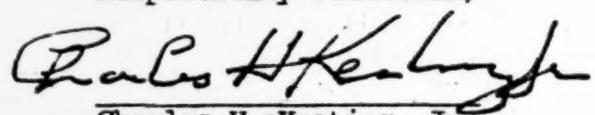
5. Articles 4666 and 4667(a)(3) of the Civil Statutes of Texas meet the test expressed in U.S. v. O'Brien, 391 U.S.

367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (May 27, 1968) in regard to the right of government to enact a law protecting a sufficiently important governmental interest (moral public nuisance abatement) which may justify an incidental limitation on First Amendment freedoms.

6. An Equity Court has inherent power to enjoin the exhibition of specific sexual acts performed in the context of commercial exploitation, independent of the Miller v. California test for obscenity.

Dated: August 24, 1979

Respectfully submitted,



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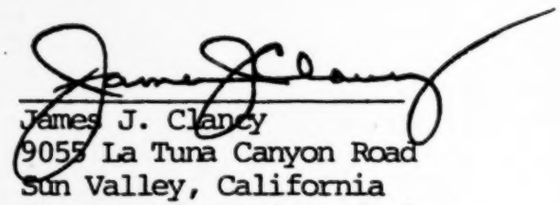

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CERTIFICIATE OF SERVICE

I, hereby certify that on this 24th day of August 1979, copies of the within Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Appellants were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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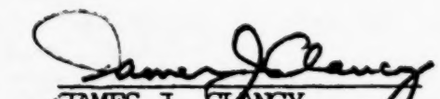

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APPENDIX A

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 5.71)

Title 52, Chapters 1 and 4 - Nuisances - of the Idaho Code, as added by S.L. 1976, Ch 82 . . . . . A-1 thru A-11

Title 7, Chapter 7.48 - Nuisances- of the Revised Code of Washington annotated, as enacted by Initiative Measure No. 335 #20 approved November 8, 1977. . . . . A-13 thru A-26

Chapter 19, Article 1 - Abatement of nuisances - of the North Carolina General Statutes, as added by Session Laws 1977, C 819, effective August 1, 1977 . . . . . A-27 thru A-34

Chapter 7, Article 1.1 - Obscene Movie and Obscene Pictorial Publication Abatement - of the Arizona Revised Code, added by Laws 1977, Ch. 125, effective May 31, 1977 . . . . . A-35 thru A-38

TITLE 52—NUISANCES

CHAPTER.
1. NUISANCES IN GENERAL, §§ 52-101—52-111.
4. MORAL NUISANCES — ACTION FOR INJUNCTION AND ABATEMENT, §§ 52-401—52-417.

CHAPTER 1—NUISANCES IN GENERAL

SECTION.
52-101. Nuisance defined.
52-102. Public nuisance.
52-103. Moral nuisances — Definitions.
52-104. Moral nuisances—Types.
52-105. Moral nuisances — Personal property — Knowledge of nuisance.
52-106. Moral nuisances — Building where gambling is carried on.
52-107. Private nuisance.
52-108. When not a nuisance.
52-109. Liability of successive owners for continuing nuisance.
52-110. Abatement does not preclude action.
52-111. Actions for nuisance.

52-101. Nuisance defined.—Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance. [I. C., § 52-101, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. This chapter, as it appears in the bound volume which comprised C. C. P. 1881, § 471, R. S., §§ 3620-3625, 4529; reen. R. C., §§ 3656, 3657; R. C., §§ 3657a-3657c, as added by 1915, ch. 43, § 2, p. 125; reen. R. C., §§ 3658-3661; R. C., § 4529; am. 1915, ch. 43, §§ 1, 3, 5, p. 125; reen. C. L., §§ 3656-3661, 4529; 1919, ch. 97, p. 361; C. S., §§ 6420-6429, 6956; I. C. A., §§ 51-101—51-111, was repealed by S. L. 1976, ch. 82, § 1 and the present chapter substituted therefor.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Burden of proof.
Instructions.
Obstruction of nonnavigable stream.
Sewage disposal facilities.
Softball field lights.
Streets and sidewalks.

Burden of Proof.

In order to obtain an injunction against or the abatement of an alleged nuisance the complaining party must show a clear case supporting his right to relief. Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 396 Pac. (2d) 471.

Instructions.

The giving of instructions to the jury on the issue of nuisance was not erroneous as raising an issue not pleaded in the complaint where the complaint charged the defendant with acts and conditions which would constitute a nuisance under this section. Archer v. Shields Lumber Co., 91 Idaho 861, 434 Pac. (2d) 79.

Obstruction of Nonnavigable Stream.

Defendant, upstream owner, a junior appropriator of water rights, had no right to damages from plaintiffs, a downstream owner, a prior appropriator, and users of water in his ditch, for removal of dam which was constructed by upstream owner, since the dam constituted a private nuisance and it was plaintiff's right to abate it. Ward v. Kidd, 87 Idaho 216, 392 Pac. (2d) 183.

Where plaintiff was entitled to water and dam constituted a private nuisance it was plaintiff's right to abate it and defendant was not entitled to damages resulting from removal of the obstruction by plaintiffs. The equipment plaintiffs took to the site crossed over sagebrush land causing no injury and they had a right to reasonable access to the channel to secure and safeguard their water right. Ward v. Kidd, 87 Idaho 216, 392 Pac. (2d) 183.

Sewage Disposal Facilities.

As a municipal corporation, the village possessed legislatively delegated power

to construct, operate and maintain sewage disposal facilities and to issue its bonds for the purpose of acquiring and constructing sewage treatment and disposal plants, together with lands and appurtenances. Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 396 Pac. (2d) 471.

A sewage disposal facility, legal in its inception, is not a nuisance per se, and its location and the manner of its operation will determine whether it is a nuisance in fact. Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 896 Pac. (2d) 471.

In proceedings for injunction against lagoon-type sewage disposal plant, evidence was insufficient to show that the lagoons, if constructed as proposed, would be located or operated so as to constitute a nuisance. Larsen v. Village of Lava Hot Springs, 88 Idaho 64, 396 Pac. (2d) 471.

Softball Field Lights.

A church softball field lighted by high-intensity lights was not a nuisance where use was restricted to the hours between 7:00 a.m. and 10:00 p.m. Corporation of the Presiding Bishop ex rel. Ashton v. Idaho Falls, 92 Idaho 571, 448 Pac. (2d) 185.

Streets and Sidewalks.

The maintenance of a street with its terminus upon the bank of a river with a barrier erected thereat was not a nuisance for there was no defect which obstructed free passage or use of the street in the customary manner. Smith v. Sharp, 82 Idaho 420, 354 Pac. (2d) 172.

52-102. Public nuisance.—A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. [I. C., § 52-102, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-103. Moral nuisances—Definitions.—As used in title 52, Idaho Code, relating to moral nuisances.

(A) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, or prostitution which occur on the premises.

(B) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(1) which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(2) which depicts or describes patently offensive representations or descriptions of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(C) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(D) "Matter" means a motion picture film or a publication or both.

(E) "Moral nuisance" means a nuisance which is injurious to public morals.

(F) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen.

(5) video tape or any other medium used to electronically reproduce images on a screen.

(G) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(H) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(I) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(J) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer or possession of, lewd matter. [I. C., § 52-103, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-104. Moral nuisances—Types.—The following are declared to be moral nuisances:

(A) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(B) Any and every place in the state where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(C) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(D) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(E) Any and every lewd publication possessed at a place which is a moral nuisance under this section; and

(F) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, or prostitution, and every such place in or upon which acts of lewdness, assignation, or prostitution, are held or occur. [I. C., § 52-104, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

Sec. to sec. ref. Sections 52-104, 52-105 are referred to in § 52-415.

52-105. Moral nuisances—Personal property—Knowledge of nuisance.—The following are also declared to be moral nuisances, as personal property used in conducting and maintaining a moral nuisance:

(A) All moneys paid as admission price to the exhibition of any lewd film found to be a moral nuisance.

(B) All valuable consideration received for the sale of any lewd publication which is found to be a moral nuisance.

(C) The furniture and movable contents of a place which is a moral nuisance.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in section 52-405, Idaho Code, upon the place, or its manager, or acting manager, or person then in charge, all such parties are deemed to have knowledge of the acts, conditions or things which make such place a moral nuisance. Where the circumstantial proof warrants a determination that a person had knowledge of the moral nuisance prior to such service of process, the court shall make such finding. [I. C., § 52-105, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-106. Moral nuisances—Building where gambling is carried on.—Any building, place, or the ground itself, wherein or whereon gambling or any game of chance for money, checks, credit or other representatives of value is carried on or takes place, or gambling paraphernalia is kept, or any notice, sign or device advertising or indicating the existence or presence of such gambling or any game of chance is displayed or exposed to view, is declared a moral nuisance and shall be enjoined and abated as provided by law. [I. C., § 52-106, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-107. Private nuisance.—Every nuisance not defined by law as a public nuisance or a moral nuisance, is private. [I. C., § 52-107, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-108. When not a nuisance.—Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. [I. C., § 52-108, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-109. Liability of successive owners for continuing nuisance.—Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one (1) who first created it. [I. C., § 52-109, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-110. Abatement does not preclude action.—The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. [I. C., § 52-110, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

52-111. Actions for nuisance.—Anything which is injurious to health or morals, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an

action. In the case of a moral nuisance, the action may be brought by any resident citizen of the county; in all other cases the action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered. [I. C., § 52-111, as added by 1976, ch. 82, § 2, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-101.

Section 3 of S. L. 1976, ch. 82, repealed former §§ 52-401—52-410, and § 4 of S. L. 1976, ch. 82, is compiled herein as the present §§ 52-401—52-417.

DECISIONS UNDER PRIOR LAW

Instructions.

The giving of instructions to the jury on issue of nuisance was not erroneous as raising an issue not pleaded in the complaint where the complaint charged the defendant with acts and conditions which would constitute a nuisance under this section. Archer v. Shields Lumber Co., 91 Idaho 861, 434 Pac. (2d) 79.

CHAPTER 3—PRIVATE NUISANCES

52-302. Abatement—When allowed.

Obstruction of Nonnavigable Stream.

Defendant upstream owner, a junior appropriator of water rights, had no right to damages from plaintiffs, a downstream owner, a prior appropriator, and users of water in his ditch, for removal of dam which was constructed by upstream owner, since the dam constituted a private nuisance and it was plaintiffs' right to abate it. Ward v. Kidd, 87 Idaho 216, 392 Pac. (2d) 183.

Where plaintiff was entitled to water, and dam constituted private nuisance, it was plaintiff's right to abate it and defendant was not entitled to damages resulting from removal of the obstruction by plaintiffs. The equipment plaintiffs took to the site crossed over sagebrush land causing no injury and they had a right to reasonable access to the channel to secure and safeguard their water right. Ward v. Kidd, 87 Idaho 216, 392 Pac. (2d) 183.

CHAPTER 4—MORAL NUISANCES—ACTION FOR INJUNCTION AND ABATEMENT

SECTION.
52-401. Cumulative remedy.
52-402. Who may maintain action.
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52-401. Cumulative remedy.—In addition to any other remedy provided by law, any act, occupation, structure or thing which is a moral nuisance, may be abated, and the person doing such act or engaged in such occupation, and the owner and agent of the owner of any such

structure or thing may be enjoined, as in this chapter provided. [I. C., § 52-401, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. This chapter, as it appears in the bound volume which comprised R. C., § 4628a-4628j, as added by 1915, ch. 43, § 6, p. 125; reen. C. L., §§ 4628a-4628j; C. S., §§ 7042-7051; I. C. A., §§ 51-401—51-410, was repealed by S. L. 1976, ch. 82, § 3 and the present chapter substituted therefor.

Section 2 of S. L. 1976, ch. 82, is compiled herein as §§ 52-101—52-111.

52-402. Who may maintain action.—The attorney general, prosecuting attorney, or any private resident citizen of the county may maintain an action of an equitable nature, as relator, in the name of the state of Idaho, to abate a moral nuisance, perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a moral nuisance.

If such action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars ($500), to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the restraining order or temporary injunction ought not to have been granted. The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. No bond shall be required of the prosecuting attorney or the attorney general, and no action shall be maintained against the public official for his official action when brought in good faith. [I. C., § 52-402, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-403. Pleadings — Jurisdiction — Venue — Application for temporary injunction.—The action, provided for in this chapter, shall be brought in any court of competent jurisdiction in the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a temporary injunction may be made to the court in which the action is filed, or to a judge thereof, who shall grant a hearing within ten (10) days after the filing. [I. C., § 52-403, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-404. Order restraining removal of personal property from premises—Service—Punishment.—Where such application for a temporary injunction is made, the court may, on application of the complainant showing good cause, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon, except that, pending such decision, the stock in trade may not be so restrained, but an inventory and full accounting of all business transactions thereafter may be required.

The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon

one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. [I. C., § 52-404, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

Sec. to sec. ref. This section is referred to in § 52-406.

52-405. Notice of hearing on temporary injunction—Consolidation.—A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five (5) days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in section 52-404, Idaho Code, in the case of a restraining order. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course.

Before or after the commencement of the hearing of an application for a temporary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the temporary injunction. Any evidence received upon an application for a temporary injunction which would be admissible upon the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits. [I. C., § 52-405, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

Sec. to sec. ref. This section is referred to in §§ 52-105, 52-415.

52-406. Right to possession of real property and personal property after hearing on the temporary injunction—Conditions for avoidance of temporary forfeiture.—If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court, the court shall issue a temporary injunction, without additional bond, restraining the defendant and any other person from continuing the nuisance.

If at the time the temporary injunction is granted, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five (5) days' notice of the hearing, then the court shall declare a temporary forfeiture of the use of the real property upon which such public nuisance is located and the personal property located therein and shall forthwith issue an order closing such place against its use for any purpose until final decision is rendered on the application for a permanent injunction, unless:

(1) the person owning, in control, or in charge of such nuisance shows to the satisfaction of the court or judge, by competent and admissible evidence which is subject to cross-examination, that the nuisance complained of has been abated by such person, or

(2) the owner of such property, as a "good faith" lessor, has taken action to void said lease as is authorized by section 52-414, Idaho Code.

Such order shall also continue in effect for such further period the order, authorized in section 52-404, Idaho Code, restraining the removal

of personal property or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided for in section 52-404, Idaho Code.

Such order shall also require such persons to show cause within thirty (30) days why such closing order should not be made permanent, as provided for in section 52-412, Idaho Code. [I. C., § 52-406, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

Sec. to sec. ref. Sections 52-406, 52-407 are referred to in § 52-412.

52-407. Right to possession of real property and personal property after finding of public nuisance—Conditions for reentry and repossession.—The owner of any real or personal property to be closed or restrained or which has been closed or restrained, may appear between the filing of the complaint and the hearing on the application for a permanent injunction, and upon payment of all cost incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept, until the decision of the court is rendered on the application for a permanent injunction, then the court, if satisfied of the good faith of the owner of the real property and of the innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof shall, at the time of the hearing on the application for the temporary injunction, refrain from issuing any order closing such real property or restraining the removal or interference with such personal property, and, if such temporary injunction has already been issued, shall discharge said order and shall deliver such real or personal property, or both, to the respective owners thereof. The release of any real or personal property, under this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected. [I. C., § 52-407, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-408. Priority of action.—The action provided for in this chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. [I. C., § 52-408, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-409. Evidence.—In such action, an admission or finding of guilty of any person under the criminal laws against lewdness, prostitution, or assignation at any such place, is admissible for the purpose of proving the existence of said nuisance, and is prima facie evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance. [I. C., § 52-409, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-410. Evidence of reputation admissible.—At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. [I. C., § 52-410, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. For repealed former section see compiler's notes to § 52-401.

52-411. Costs.—If the action is brought by a private person and the court finds that there were no reasonable grounds or probable cause for bringing said action, and the case is dismissed for that reason before trial, or if the action is dismissed for want of prosecution, the costs may be taxed to such person.

If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere, and the entire expenses of such abatement, including attorney's fees, shall be recoverable by plaintiff as a part of his costs of the lawsuit.

If the complaint is filed by a private person, it shall not be voluntarily dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. [I. C., § 52-411, as added by 1976, ch. 82, § 4, p. 270.]

52-412. Content of final judgment and order.—If the existence of a nuisance is admitted or established in an action as provided for in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court, as provided for in sections 52-406 and 52-407, Idaho Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Lewd matter shall be destroyed and not be sold.

Such order shall also require the renewal for one (1) year of any bond furnished by the owner of the real property, as provided in section 52-407, Idaho Code, or, if not so furnished, shall continue for one (1) year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one (1) year unless sooner released.

The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 52-407, Idaho Code.

Owners of unsold personal property and contents so seized must appear and claim the same within ten (10) days after such order of abatement is made, and prove innocence, to the satisfaction of the

court, of any knowledge of said use thereof, and that with reasonable care and diligence they could not have known thereof. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court. [I. C., § 52-412, as added by 1976, ch. 82, § 4, p. 270.]

Sec. to sec. ref. This section is referred to in § 52-406.

52-413. Court shall punish offender for violation of injunction or order.—In case of the violation of any injunction or closing order, granted under this chapter, or of a restraining order or the commission of any contempt of court in proceedings under this chapter, the court may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses. [I. C., § 52-413, as added by 1976, ch. 82, § 4, p. 270.]

52-414. Lease void if building used for lewd purposes.—If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, or prostitution, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises. [I. C., § 52-414, as added by 1976, ch. 82, § 4, p. 270.]

Sec. to sec. ref. This section is referred to in § 52-406.

52-415. Civil penalty — Forfeiture — Accounting — Lien as to expenses of abatement.—Lewd matter is contraband, and there are no property rights therein. All personal property declared to be a moral nuisance in section 52-104, Idaho Code, and all moneys and other considerations declared to be a moral nuisance under section 52-105, Idaho Code, are the subject of forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such moneys may be traced to and shall be recoverable from persons who, under section 52-405, Idaho Code, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendants in legal proceedings brought pursuant to this chapter, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under this section. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such matter is sold or exhibited, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare, public health and public morals.

Where the action is brought pursuant to this chapter, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to the following:

(1) investigative costs.

(2) court costs.

(3) reasonable attorney's fees arising out of the preparation for, and trial of the cause, and appeals therefrom, and other costs allowed on appeal.

(4) printing costs of trial and appellate briefs, and all other papers filed in such proceedings. [I. C., § 52-415, as added by 1976, ch. 82, § 4, p. 270.]

52-416. Immunity.—The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (1) has no financial interest in the place wherein he is so employed, and (2) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this chapter, including pre-trial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. [I. C., § 52-416, as added by 1976, ch. 82, § 4, p. 270.]

52-417. Severability.—If any section, subsection, sentence, or clause of this act is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this act. It is hereby declared that this act would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. [I. C., § 52-417, as added by 1976, ch. 82, § 4, p. 270.]

Compiler's notes. The words "this act" refer to S. L. 1976, ch. 82 compiled herein as §§ 52-101—52-417.

APPENDIX A

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 5.71)

Title 7, Chapter 7.48 - Nuisances- of the Revised Code of Washington annotated, as enacted by Initiative Measure No. 335 §20 approved November 8, 1977. . . . . A-13 thru A-26

CHAPTER 7.48—NUISANCES

46 Wn LR 48 (nuisance as modern mode of land use control).

48 Wn LR 904 (nuisance actions against municipal airports).

7.48.010 Actionable nuisances defined

9 Am Jur Proof of Facts, Pollution, Proof No. 1 (evidence of pollution of stream by upper riparian user).

26 Am Jur Proof of Facts, Community Noise, p 274 (heavy-duty diesel trucks operated in or near residential area), p 301 (automobile, motorcycle, and drag strip races conductd near residential area).

46 Wn LR 58 (actionable private nuisances in Washington).

77 ALR2d 1355 (airport operations or flight of aircraft as taking or damaging of property).

80 ALR2d 1124 (water sports, amusements, or exhibitions as nuisance).

82 ALR2d 413 (parking lot or place as nuisance).

83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).

83 ALR2d 936 (nonencroaching vegetation as private nuisance).

84 ALR2d 653 (automobile wrecking yard or place of business as nuisance).

86 ALR2d 1322 (oil refinery as nuisance).

91 ALR2d 572 (drive-in restaurant or cafe as nuisance).

93 ALR2d 1171 (drive-in theater or other outdoor dramatic or musical entertainment as nuisance).

2 ALR3d 931 (keeping pigs as nuisance).

2 ALR3d 965 (keeping poultry as nuisance).

2 ALR3d 1372 (motorbus or truck terminal as nuisance).

4 ALR3d 902 (electric generating plant or transformer station as nuisance).

5 ALR3d 989 (saloons or taverns as nuisance).

11 ALR3d 1399 (keeping of dogs as enjoinable nuisance).

39 ALR3d 910 (landowner's right to relief against pollution of his water supply by industrial or commercial waste).

41 ALR3d 1236 (laundry or dry cleaning establishment as nuisance).

41 ALR3d 1273 (automobile race track or drag strip as nuisance).

43 ALR3d 1009 (operation of incinerator as nuisance).

44 ALR3d 257 (estoppel of municipality as to encroachments on public streets).

49 ALR3d 545 (residential swimming pools as nuisance).

49 ALR3d 652 (public swimming pool as nuisance).

50 ALR3d 209 (gasoline or other fuel storage tanks as nuisance).

50 ALR3d 969 (exhibition of obscene motion pictures as nuisance).

58 ALR3d 1126 (zoo as nuisance).

58 ALR3d 1134 (pornoshops or similar places disseminating obscene materials as nuisance).

58 ALR3d 1142 (interference with radio or television reception as nuisance).

79 ALR3d 253 (airport operations or flight of aircraft as nuisance).

79 ALR3d 320 (existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment).

80 ALR3d 962 (fence as nuisance).

92 ALR3d 1004 (operation of cement plant as nuisance).

A. GENERAL CONSIDERATIONS

1. In General

Where governmental body is responsible for existence of nuisance per se, that is, it has created or permitted condition which is not permissible or excusable under circumstances, it is liable for injury sustained therefrom regardless of whether negligence is involved; however, if injuries result from situation which is caused by negligent commissions or omissions on part of governmental body, though it may be termed nuisance under certain circumstances, defense of governmental immunity will be sustained. Macy v Chelan (1962) 59 Wn 2d 610, 369 P2d 508.

3. Defenses

Where governmental body is responsible for existence of nuisance per se, that is, it has created or permitted condition which is not permissible or excusable under circumstances, it is liable for injury sustained therefrom regardless of whether negligence is involved; however, if injuries result from situation which is caused by negligent commissions or omissions on part of governmental body, though it may be termed nuisance under certain circumstances, defense of governmental immunity will be sustained. Macy v Chelan (1962) 59 Wn 2d 610, 369 P2d 508.

Whenever nuisance has its origin in negligence, defense of contributory negligence cannot be cut off. Albin v National Bank of Commerce (1962) 60 Wn 2d 745, 375 P2d 487.

Party is not estopped to complain of erection of chicken breeding plant near his residence because of fact that he failed to object when he had knowledge that substantial sum was being invested in plant, where complaining party was assured by owner that he would suffer no objectionable effects from such plant. Jones v Rumford (1964) 64 Wn 2d 559, 392 P2d 808.

5. Remedies

In action for damages based on unconstitutional taking it was not improper to give instruction defining nuisance in language of this statute where such instruction simply informed jury that, in determining whether there had been damage within constitutional prohibition, it could take into consideration those things defined which constitute damage. Cunningham v Tieton (1962) 60 Wn 2d 434, 374 P2d 375.

B. PARTICULAR NUISANCE

7. In General

In action for injury sustained when plaintiff dived off pier, maintained by defendant municipal corporation, and struck bottom because of shallowness of water, maintenance of pier did not constitute nuisance per se, where facility was not dangerous at all times, but only during periodic off-season lowering of water level, and only fault of defendant, if any, was negligence in failing to discover occasional danger and warn plaintiff thereof. Macy v Chelan (1962) 59 Wn 2d 610, 369 P2d 508.

Plant operated lawfully and in best manner practicable with sound operation may still constitute nuisance if such operation is unreasonable use of property; not even fee simple owner has totality of rights with respect to his real property and he must not put property to unreasonable use relative to use and enjoyment by another of his property. Jones v Rumford (1964) 64 Wn 2d 559, 392 P2d 808.

Fact that thing is unsightly or offends aesthetic sense of neighbor, does not ordinarily make it a nuisance. Mathewson v Primeau (1964) 64 Wn 2d 929, 395 P2d 183.

Party, whose property was damaged when culvert in upstream fill clogged to such extent that fill gave way and suddenly released water that had backed up behind it, failed to show that culvert and fill were nuisance created by former owner thereof when such owner had negligently rebuilt culvert, in such way that it required constant maintenance, and then conveyed culvert and fill to individuals who could not reasonably be expected to maintain culvert to degree that it would keep it adequate, where, even assuming culvert to be negligently constructed, there was no invasion of downstream interest while fill and culvert belonged to, and were maintained by, former owner, and evidence failed to establish that necessary maintenance of culvert was unreasonable burden on subsequent owners, or that such burden was substantially different than that related to any other culvert. Rayonier, Inc. v Chicago, M. St. P. & P. R. Co. (1966) 68 Wn 2d 103, 411 P2d 864.

7.48.020 Who may sue—Judgment for damages—Warrant for abatement—Injunction

83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).

83 ALR2d 936 (nonencroaching vegetation as private nuisance).

11 ALR3d 1399 (keeping of dogs as enjoinable nuisance).

40 ALR3d 601 (modern status of rules as to balance of convenience or social utility as affecting relief from nuisance).

42 ALR3d 844 ("coming to a nuisance" as a defense or estoppel).

53 ALR3d 873 (nuisance: right of one compelled to discontinue business or activity constituting nuisance to indemnity from successful plaintiff).

60 ALR3d 665 (right to maintain action to enjoin public nuisance as affected by existence of pollution control agency).

2. Actions for Damages

Fact that action for damages is based on unconstitutional taking by governmental body does not exclude proof of damaging by nuisance. Cunningham v Tieton (1962) 60 Wn 2d 434, 374 P2d 375.

5. Equitable Relief

Fact that thing is unsightly or offends against aesthetic sense of neighbor, does not ordinarily afford ground for injunctive relief. Mathewson v Primeau (1964) 64 Wn 2d 929, 395 P2d 183.

Even where offense against aesthetic sense is held to be proper subject of control by legislation under police power, similar control by courts by means of injunctive relief not based on legislative action will constitute unauthorized interference with rights of property owner. Mathewson v. Primeau (1964) 64 Wn 2d 929, 395 P2d 183.

10. Judgment or Decree

An injunction should not permanently enjoin all aspects of a lawful business unless there has been a showing that it is impossible or impracticable to eliminate offensive features of the business. Chambers v. Mt. Vernon (1974) 11 Wn App 357, 522 P2d 1184.

7.48.050 Moral nuisances—Definitions

The definitions set forth in this section shall apply throughout this chapter as they relate to moral nuisances.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd manner, or knowledge of the acts of lewdness, assignation, or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Moral nuisance" means a nuisance which is injurious to public morals.

(6) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(7) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(8) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter. [Amended by Initiative Measure No. 335 § 1, approved November 8, 1977.]

Initiative 335 is unconstitutional on its face. Spokane Arcades, Inc. v Ray (1978) 449 F Supp 1145.

7.48.052 Moral nuisances

The following are declared to be moral nuisances:

(1) Any and every place in the state where lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the state where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a moral nuisance under this section;

(4) Any and every place of business in the state in which lewd publications constitute a principal part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a moral nuisance under this section;

(6) Every place which, as a regular course of business, is used for the purpose of lewdness, assignation, or prostitution, and every such place in or upon which acts of lewdness, assignation, or prostitution are conducted, permitted, carried on, continued, or exist;

(7) All public houses or places of resort where illegal gambling is carried on or permitted; all houses or places within any city, town, or village, or upon any public road, or highway where drunkenness, illegal gambling, fighting, or breaches of the peace are carried on or permitted; all opium dens, or houses, or places of resort where opium smoking is permitted. [Added by Initiative Measure No. 335 § 2, approved November 8, 1977.]

CJS Nuisances §§ 20 et seq.
Key Number Digests: Nuisance ⇐61.

Initiative 335 is unconstitutional on its face. Spokane Arcades, Inc. v Ray (1978) 449 F Supp 1145.

7.48.054 Moral nuisance—Personal property—Effects of notice

The following are also declared to be moral nuisances, as personal property used in conducting and maintaining a moral nuisance:

(1) All moneys paid as admission price to the exhibition of any lewd film found to be a moral nuisance;

(2) All valuable consideration received for the sale of any lewd publication which is found to be a moral nuisance;

(3) The furniture, fixtures, and contents of a place which is a moral nuisance.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in RCW 7.48.064, upon the place or its manager, acting manager, or person then in charge, all such persons are deemed to have knowledge of the acts, conditions, or things which make such place a moral nuisance. Where the circumstantial proof warrants a determination that a person had knowledge of the moral nuisance prior to such service of process, the court shall make such finding. [Added by Initiative Measure No. 335 § 3, approved November 8, 1977.]

CJS Nuisances §§ 20 et seq.
Key Number Digests: Nuisance ⇐61.

7.48.056 Abate moral nuisance—Enjoin owner

In addition to any other remedy provided by law, any act, occupation, structure, or thing which is a moral nuisance may be abated, and the person doing such act or engaged in such occupation, and the owner and agent of the owner of any such structure or thing, may be enjoined as provided in this chapter. [Added by Initiative Measure No. 335 § 4, approved November 8, 1977.]

CJS Nuisances §§ 102, 109, 130.
Key Number Digests: Nuisance ⇐77.

7.48.058 Maintaining action to abate moral nuisance—Bond

The attorney general, prosecuting attorney, city attorney, city prosecutor, or any citizen of the county may maintain an action of an equitable nature in the name of the state of Washington upon the relation of such attorney general, prosecuting attorney, city attorney, city prosecutor, or citizen, to abate a moral nuisance, to perpetually enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a moral nuisance.

If such action is instituted by a private person, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of

not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, and the court finds there was no reasonable grounds or cause for said action and the case is dismissed for that reason before trial or for want of prosecution. No bond shall be required of the attorney general, prosecuting attorney, city attorney, or city prosecutor, and no action shall be maintained against such public official for his official action when brought in good faith. [Added by Initiative Measure No. 335 § 5, approved November 8, 1977.]

CJS Nuisances §§ 76 et seq., 121 et seq.
Key Number Digests: Nuisance ⇐82, 84.

7.48.060 Moral nuisance—Jurisdiction—Filing a complaint

The action provided for in RCW 7.48.058 shall be brought in any court of competent jurisdiction in the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a temporary injunction may be made to the court in which the action is filed, or to a judge thereof, who shall grant a hearing within ten days after the filing. [Amended by Initiative Measure No. 335 § 6, approved November 8, 1977.]

Initiative 335 is unconstitutional on its face. Spokane Arcades, Inc. v Ray (1978) 449 F Supp 1145.

7.48.062 Moral nuisance—Restraining order—Violations

Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant showing good cause, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon, except that pending such decision, the stock in trade may not be so restrained, but an inventory and full accounting of all business transactions may be required.

The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof while the same remains in force is a contempt of court if such posted order contains therein a notice to that effect. [Added by Initiative Measure No. 335 § 7, approved November 8, 1977.]

CJS Nuisances §§ 102, 109, 130.
Key Number Digests: Nuisance ⇐77.

7.48.064 Moral nuisance—Hearing—Notice—Consolidation with trial

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least three days before such hearing. The place may

also be served by posting such papers in the same manner as is provided for in RCW 7.48.062 in the case of a restraining order. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course.

Before or after the commencement of the hearing of an application for a temporary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the temporary injunction. Any evidence received upon an application for a temporary injunction which would be admissible in the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits. [Added by Initiative Measure No. 335 § 8, approved November 8, 1977.]

CJS Nuisances §§ 121 et seq.
Key Number Digests: Nuisance ⇐84.

7.48.066 Finding of moral nuisance—Orders

If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond, restraining the defendant and any other person from continuing the nuisance.

If at the time the temporary injunction is granted, it further appears that the person owning, in control of, or in charge of the nuisance so enjoined had received three days notice of the hearing, then the court shall declare a temporary forfeiture of the use of the real property upon which such public nuisance is located and the personal property located therein, and shall forthwith issue an order closing such place against its use for any purpose until a final decision is rendered on the application for a permanent injunction, unless:

(1) The person owning, in control of, or in charge of such nuisance shows to the satisfaction of the court or judge, by competent and admissible evidence which is subject to cross-examination, that the nuisance complained of has been abated by such person; or

(2) The owner of such property, as a "good faith" lessor, has taken action to void said lease as is authorized by RCW 7.48.085.

Such order shall also continue in effect for such further period as the order authorized in RCW 7.48.062 provides. If no order has been issued pursuant to RCW 7.48.062, then an order restraining the removal or interference with the personal property and contents located therein shall be issued. Such restraining order shall be served and the inventory of such property shall be made and filed as provided for in RCW 7.48.062.

Such order shall also require such persons to show cause within thirty days why such closing order should not be made permanent, as provided for in RCW 7.48.078. [Added by Initiative Measure No. 335 § 9, approved November 8, 1977.]

CJS Nuisances §§ 121 et seq.
Key Number Digests: Nuisance ⇐84.

7.48.068 Abatement of moral nuisance by owner—Effect on injunction

The owner of any real or personal property to be closed or restrained, or which has been closed or restrained, may appear after the filing of the complaint and before the hearing on the application for a permanent injunction.

The court, if satisfied of the good faith of the owner of the real property and of the innocence on the part of any owner of the personal property of any knowledge of its use as a nuisance, and that with reasonable care and diligence such owner could not have known thereof shall, at the time of the hearing on the application for the temporary injunction and upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept, refrain from issuing any order closing such real property or restraining the removal or interference with such personal property, and, if such temporary injunction has already been issued, shall cancel said order and shall deliver such real or personal property, or both, to the respective owners thereof. The release of any real or personal property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subjected by law. [Added by Initiative Measure No. 335 § 10, approved November 8, 1977.]

Voluntary abatement: RCWA 7.48.110.

CJS Nuisances §§ 102, 109, 130.
Key Number Digests: Nuisance ⇐77.

7.48.070 Moral nuisance—Priority of action on calendar

The action provided for in RCW 7.48.058 shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. [Amended by Initiative Measure No. 335 § 11, approved November 8, 1977.]

CJS Trial § 33.
Key Number Digests: Trial ⇐13.1(2).

7.48.072 Moral nuisance—Effects of admission or finding of guilt

In such action, an admission or finding of guilty of any person under the criminal laws against lewdness, prostitution, or assignation at any such place is admissible for the purpose of proving the existence of such nuisance, and is prima face evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining such nuisance. [Added by Initiative Measure No. 335 § 12, approved November 8, 1977.]

7.48.074 Moral nuisance—Evidence of reputation—Admissibility

At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. [Added by Initiative Measure No. 335 § 13, approved November 8, 1977.]

CJS Nuisances §§ 121 et seq.
Key Number Digests: Nuisance ⇐84.

7.48.076 Moral nuisance—Trial—Costs—Dismissal—Judgment

If the action is brought by a person who is a citizen of the county, and the court finds that there were no reasonable grounds or probable cause for bringing said action, and the case is dismissed before trial for that reason or for want of prosecution, the costs, including attorney's fees, may be taxed to such person.

If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere. The entire expenses of such abatement, including attorney's fees, shall be recoverable by the plaintiff as a part of his costs of the lawsuit.

If the complaint is filed by a person who is a citizen of the county, it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action should not be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued for more than one term of court, any person who is a citizen of the county or has an office therein, or the attorney general, the prosecuting attorney, city attorney, or city prosecutor, may be substituted for the complainant and prosecute said action to judgment. [Added by Initiative Measure No. 335 § 14, approved November 8, 1977.]

7.48.078 Moral nuisance—Judgment—Penalties—Disposal personal property

If the existence of a nuisance is admitted or established in an action as provided for in RCW 7.48.058 or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance and not already released under authority of the court as provided for in RCW 7.48.066 and 7.48.068, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Lewd matter shall be destroyed and shall not be sold.

Such judgment shall impose a penalty of three hundred dollars for the maintenance of such nuisance, which penalty shall be imposed against the person or persons found to have maintained the nuisance, and, in case any owner or agent of the building found to have had actual or constructive notice of the maintenance of such nuisance, against such owner or agent, and against the building kept or used for the purposes of maintaining a moral nuisance, which penalty shall be collected by execution as in civil actions, and when collected, shall be paid into the current expense fund of the county in which the judgment is had.

Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in RCW 7.48.068 or, if not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose and keeping it closed for a period of one year unless sooner released.

The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in RCW 7.48.068.

Owners of unsold personal property and contents so seized must appear and claim the same within ten days after such order of abatement is made, and prove innocence to the satisfaction of the court of any knowledge of such use thereof, and that with reasonable care and diligence they could not have known thereof. If such innocence is established, such unsold personal proper-

ty and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court. [Added by Initiative Measure No. 335 § 15, approved November 8, 1977.]

CJS Nuisances §§ 121 et seq.
Key Number Digests: Nuisance ⇐84, 85.

7.48.080 Moral nuisance—Contempt for violation of injunction

In case of the violation of any injunction granted under the provisions of RCW 7.48.050 through 7.48.100 as now or hereafter amended, the court or judge may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause an attachment to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment. [Amended by Initiative Measure No. 335 § 16, approved November 8, 1977.]

CJS Nuisances § 135.
Key Number Digests: Nuisance ⇐86.

7.48.085 Moral nuisance—Property owner may repossess

If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of maintaining a moral nuisance, such use makes void at the option of the owner the lease or other title under which he holds, and without any act of the owner causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises. [Added by Initiative Measure No. 335 § 17, approved November 8, 1977.]

CJS Landlord and Tenant §§ 326 et seq., 716 et seq.
Key Number Digests: Landlord and Tenant ⇐134(3), 275.

7.48.090 Moral nuisance—Contraband—Forfeitures

Lewd matter is contraband, and there are no property rights therein. All personal property declared to be a moral nuisance in RCW 7.48.052 and 7.48.054 and all moneys and other consideration declared to be a moral nuisance under RCW 7.48.056 are the subject of forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited, or otherwise used. Such moneys may be traced to and shall be recoverable from persons who, under RCW 7.48.064, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendants in legal proceedings brought pursuant to RCW 7.48.050 through 7.48.100 as now or hereafter amended, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under this section. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein

such matter is sold or exhibited, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise and as partial restitution for damages done to the public welfare, public health, and public morals.

Where the action is brought pursuant to RCW 7.48.050 through 7.48.100 as now or hereafter amended, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to the following:

(1) Investigative costs;

(2) Court costs;

(3) Reasonable attorney's fees arising out of the prepartion for and trial of the cause, appeals therefrom, and other costs allowed on appeal;

(4) Printing costs of trial and appellate briefs, and all other papers filed in such proceedings. [Amended by Initiative Measure No. 335 § 18, approved November 8, 1977.]

7.48.100 Moral nuisance—Immunity or certain motion picture theatre employees

The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, if such projectionist, usher, or ticket taker (1) has no financial interest in the place wherein he is so employed, other than his salary, and (2) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under RCW 7.48.050 through 7.48.100 as now or hereafter amended, including pretrial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. [Amended by Initiative Measure No. 335 § 19, approved November 8, 1977.]

7.48.120 Nuisance defined

77 ALR2d 1355 (airport operations or flight of aircraft as taking or damaging of property).
82 ALR2d 413 (parking lot or place as nuisance).
83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).
83 ALR2d 936 (nonencroaching vegetation as private nuisance).
84 ALR2d 653 (automobile wrecking yard or place of business as nuisance).
86 ALR2d 1322 (oil refinery as nuisance).
91 ALR2d 572 (drive-in restaurant or cafe as nuisance).
92 ALR2d 974 (dairy, creamery, or milk distributing plant, as nuisance).
93 ALR2d 1171 (drive-in theater or other outdoor dramatic or musical entertainment as nuisance).
2 ALR3d 931 (keeping pigs as nuisance).
2 ALR3d 965 (keeping poultry as nuisance).
2 ALR3d 1372 (motorbus or truck terminal as nuisance).
4 ALR3d 902 (electric generating plant or transformer station as nuisance).
5 ALR3d 989 (saloons or taverns as nuisance).
11 ALR3d 1399 (keeping of dogs as enjoinable nuisance).
32 ALR3d 1127 (children's playground as nuisance).
55 ALR3d 1134 (pornoshops or similar places disseminating obscene materials as nuisance).
58 ALR3d 1126 (zoo as nuisance).
58 ALR3d 1142 (interference with radio or television reception as nuisance).
79 ALR3d 253 (airport operations or flight or aircraft as nuisance).

79 ALR3d 320 (existence of, and relief from, nuisance created by operation of air conditioning or ventilating equipment).

80 ALR3d 962 (fence as nuisance).

82 ALR3d 1004 (operation of cement plant as nuisance).

1. In General

In action for injury sustained when plaintiff dived off pier, maintained by defendant municipal corporation, and struck bottom because of shallowness of water, maintenance of pier did not constitute nuisance per se, where facility was not dangerous at all times, but only during periodic off-season lowering of water level, and only fault of defendant, if any, was negligence in failing to discover occasional danger and warn plaintiff thereof. Macy v Chelan (1962) 59 Wn 2d 610, 369 P2d 508.

Instructions.—After having given instructions on plaintiff's theory of negligence, court properly refused to give proposed instruction on nuisance which was based on same omission to perform duty which allegedly constituted negligence, and which was requested for purpose of depriving defendant of defense of contributory negligence. Albin v National Bank of Commerce (1962) 60 Wn 2d 745, 375 P2d 487.

Plant operated lawfully and in best manner practicable with sound operation may still constitute nuisance if such operation is unreasonable use of property; not even fee simple owner has totality of rights with respect to his real property and he must not put property to unreasonable use relative to use and enjoyment by another of his property. Jones v Rumford (1964) 64 Wn 2d 559, 392 P2d 808.

Party, whose property was damaged when culvert in upstream fill clogged to such extent that fill gave way and suddenly released water that had backed up behind it, failed to show that culvert and fill were nuisance created by former owner thereof when such owner had negligently rebuilt culvert, in such way that it required constant maintenance, and then conveyed culvert and fill to individuals who could not reasonably be expected to maintain culvert to degree that it would keep it adequate, where, even assuming culvert to be negligently constructed, there was no invasion of downstream interest while fill and culvert belonged to, and were maintained by, former owner, and evidence failed to establish that necessary maintenance of culvert was unreasonable burden on subsequent owners, or that such burden was substantially different than that related to any other culvert. Rayonier, Inc. v Chicago, M. St. P. & P. R. Co. (1966) 68 Wn 2d 103, 411 P2d 864.

2. Obstruction of Public Ways

Abutting property owners could not be said to have created nuisance or violated their duty to use property so as not to render adjacent highways unsafe for ordinary travel, simply because surface waters they caused to drain onto highway had collected in large pool and obstructed ordinary travel, where cause of collection of water was inadequate drainage in highway and highway was under exclusive control of county. Kelly v Gifford (1963) 63 Wn 2d 221, 386 P2d 415.

7.48.130 Public nuisance defined

82 ALR2d 413 (parking lot or place as nuisance).
83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).
91 ALR2d 572 (drive-in restaurant or cafe as nuisance).

7.48.140 Public nuisances enumerated

82 ALR2d 413 (parking lot or place as nuisance).
91 ALR2d 572 (drive-in restaurant or cafe as nuisance).

The legitimacy of an electical transmission line installation is not germane to any question as to its being or not being a public nuisance inasmuch as such lines generally are not classified as public nuisances despite their encroachment upon public or private property. Frisch v Public Utility Dist. of Snohomish County (1973) 8 Wn App 555, 507 P2d 1201.

7.48.150 Private nuisance defined

46 Wn LR 54 (nuisance as land use control—private nuisance).
82 ALR2d 413 (parking lot or place as nuisance).
83 ALR2d 936 (nonencroaching vegetation as private nuisance).
91 ALR2d 572 (drive-in restaurant or cafe as nuisance).
93 ALR2d 1171 (drive-in theater or other outdoor dramatic or musical entertainment as nuisance).

7.48.160 Authorized act not a nuisance

Highway built pursuant to specific statute and under general statutory authority of highway statutes, cannot constitute nuisance in fact simply because of its proximity to certain building, since nothing which is done or maintained under express authority of statute can be deemed nuisance. Deaconess Hospital v Washington State Highway Com. (1965) 66 Wn 2d 378, 403 P2d 54.

7.48.200 Remedies

83 ALR2d 848 (practice of exacting usury as nuisance or ground for injunction).

7.48.210 Civil action, who may maintain

35 Wn LR 362 (standing requirements for obtaining review of governmental action in Washington).
60 ALR3d 665 (right to maintain action to enjoin public nuisance as affected by existence of pollution control agency).

4. Acts in Violation of Law

Injunctive relief is available against violations of zoning ordinances which are declared by ordinance to be nuisances. Mercer Island v Steinmann (1973) 9 Wn App 479, 513 P2d 80.

7.48.230 Public nuisance—Abatement

60 ALR3d 665 (right to maintain action to enjoin public nuisance as affected by existence of pollution control agency).

Finding that defendant "in employing the bulldozer to improve his access, had no reasonable necessity to remove the hedge which plaintiffs had maintained upon the twelve foot strip and upon the railroad right of way; said defendant could have stayed to the west of plaintiffs' and no useful purpose was served by removing the said hedge and the bulkhead," brought defendants within this statute's prohibition against committing unnecessary injury, in action for damages from wilful trespass. Nystrand v O'Malley (1962) 60 Wn 2d 792, 375 P2d 863.

7.48.240 Certain places of resort declared nuisances

Houses of ill fame, kept for the purpose, where persons are employed for purposes of prostitution; all public houses or places of resort where gambling is carried on, or permitted; all houses or places within any city, town, or village, or upon any public road, or highway where drunkenness, gambling, fighting or breaches of the peace are carried on, or permitted; all opium dens, or houses, or places of resort where opium smoking is permitted, are nuisances, and may be abated, and the owners, keepers, or persons in charge thereof, and persons carrying on such unlawful business shall be punished as provided in this chapter. [Amended by Laws 1st Ex Sess 1973 ch 154 § 18.]

Severability—1973 1st ex.s. c 154: See note following RCW 2.12.030.

7.48.250 Penalty—Abatement

1 Am Jur Pl and Pr Forms (Rev ed), Abatement, Form 51 (order sustaining plea in abatement).

7.48.900 Severability—Initiative Measure No. 335

If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected. [Enacted by Initiative Measure No. 335 § 20, approved November 8, 1977.]

APPENDIX A

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 5.71)

Chapter 19, Article 1 - Abatement of nuisances - of the North Carolina General Statutes, as added by Session Laws 1977, C 819, effective August 1, 1977 . . . . . A-27 thru A-34

Chapter 19.

Offenses against Public Morals.

Article 1.

Abatement of Nuisances.

Sec.
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19-1.3. Personal property as a nuisance; knowledge of nuisance.
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19-2. [Repealed.]
19-2.1. Action for abatement; injunction.
19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction.
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Article 2.

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19-9. Title.
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19-21. [Repealed.]

ARTICLE 1.

Abatement of Nuisances.

§ 19-1. What are nuisances under this Chapter. — (a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors, illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter, shall constitute a nuisance.

(b) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place wherein or whereon are carried on, conducted, or permitted repeated acts which create and constitute a breach of the peace shall constitute a nuisance.

(c) The building, or place, or vehicle, or the ground itself, in or upon which a nuisance as defined in subsections (a) or (b) above is carried on, and the furniture, fixtures, and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (Pub. Loc. 1913, c. 761, s. 25; 1919, c. 288; C. S., s. 3180; 1949, c. 1164; 1967, c. 142; 1971, c. 655; 1977, c. 819, ss. 1, 2.)

Cross References. — As to criminal actions: For prostitution, see § 14-203 et seq.; for gambling, see § 14-289 et seq.; for unlawful sale of whiskey, see § 18A-56.

Editor's Note. — The 1977 amendment deleted "or" preceding "illegal possession or sale" and substituted "North Carolina Control Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter" for "Uniform Narcotic Drug Act" in

§ 19-1.1. Definitions. — As used in this Chapter relating to illegal possession or sale of obscene matter or to the other conduct prohibited in G.S. 19-1(a), the following definitions shall apply:

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts patently offensive representations of:

1. Ultimate sexual acts, normal or perverted, actual or simulated;
2. Masturbation, excretory functions, or lewd exhibition of the genitals or genital area;
3. Masochism or sadism; or
4. Sexual acts with a child or animal.

Nothing herein contained is intended to include or proscribe any writing or written material, nor to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, educational, or scientific value.

(3) "Lewdness" is synonymous with obscenity and shall mean the act of selling, exhibiting or possessing for sale or exhibition lewd matter.

(4) "Matter" means a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself, but excluding a private dwelling place not used for a profit.

(8) "Publication" shall include any book, magazine, pamphlet, illustration, photograph, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(9) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer or possession of, lewd matter. (1977, c. 819, s. 3.)

§ 19-1.2. Types of nuisances. — The following are declared to be nuisances wherein obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

(1) Any and every place in the State where lewd films are publicly exhibited as a predominant and regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a nuisance under this Article;

(4) Any and every place of business in the State in which lewd publications constitute a principal or substantial part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a nuisance under this Article;

(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, are held or occur. (1977, c. 819, s. 3.)

§ 19-1.3. Personal property as a nuisance; knowledge of nuisance. — The following are also declared to be nuisances, as personal property used in conducting and maintaining a nuisance under this Chapter:

(1) All moneys paid as admission price to the exhibition of any lewd film found to be a nuisance;

(2) All valuable consideration received for the sale of any lewd publication which is found to be a nuisance;

(3) All money or other valuable consideration received or used in gambling, prostitution, the illegal sale of intoxicating liquors or the illegal sale of substances prescribed under the North Carolina Controlled Substances Act, as well as the furniture and movable contents of a place used in connection with such prohibited conduct.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in G.S. 19-2.4 upon the place, or its manager, or acting manager, or person then in charge, all such parties are deemed to have knowledge of the contents of the restraining order and the use of the place occurring thereafter. Where the circumstantial proof warrants a determination that a person had knowledge of the nuisance prior to such service of process, the court may make such finding. (1977, c. 819, s. 3.)

§ 19-1.4. Liability of successive owners for continuing nuisance. — After notice of a temporary restraining order, preliminary injunction, or permanent injunction, every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it. (1977, c. 819, s. 3.)

§ 19-1.5. Abatement does not preclude action. — The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. (1977, c. 819, s. 3.)

§ 19-2: Repealed by Session Laws 1977, c. 819, s. 4, effective August 1, 1977.

Cross Reference. — For present provisions covering the subject matter of the repealed section, see §§ 19-2.1 to 19-2.5.

§ 19-2.1. Action for abatement; injunction. — Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the Attorney General, district attorney, or any private citizen of the county may maintain a civil action in the

name of the State of North Carolina to abate a nuisance under this Chapter, perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a nuisance under this Chapter; provided, however, that no private citizen may maintain such action where the alleged nuisance involves the illegal possession or sale of obscene or lewd matter.

If an action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than one thousand dollars ($1,000), to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the temporary restraining order or preliminary injunction ought not to have been granted. The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. No bond shall be required of the prosecuting attorney or the Attorney General, and no action shall be maintained against the public official for his official action. (1977, c. 819, s. 4.)

Editor's Note. — The annotations set out below are from cases decided under former § 19-2.

An action to abate a public nuisance by injunction or otherwise must be maintained in the name of the State, and this section designates with particularity those who may become relators and prosecute the cause in the name of the State. Dare County v. Mater, 235 N.C. 179, 69 S.E.2d 244 (1952).

While the members of a county board of commissioners may, as individuals, become relators under this section, they may not prosecute this action in the name of the county. Dare County v. Mater, 235 N.C. 179, 69 S.E.2d 244 (1952).

Procedure Cannot Be Invoked against Alcoholic Control Board. — It was never intended that the procedure here invoked to abate a nuisance should be applied against the alcoholic control board set up under color of legislative authority, or against one who rents a building to such a board for the purpose of operating a liquor control store. State ex rel. Amick v. Lancaster, 228 N.C. 157, 44 S.E.2d 733 (1947).

The proceeding by a citizen in the name of the State for injunction, the closing of a place of business and the seizure and sale of the personal property used therewith, must be based upon allegation and proof of one or more of the specific acts denounced by § 19-1. State ex rel. Dickey v. Alverson, 225 N.C. 29, 33 S.E.2d 135 (1945).

Allegation of Direct Injury to Citizen Bringing Action Not Required. — While ordinarily a resident and citizen may not enjoin public officials from putting into effect the provisions of a legislative enactment on the ground that the act is unconstitutional unless he alleges and proves that he will suffer direct injury, such allegation is not necessary in an action in the name of the State under this section to enjoin the maintenance of a gambling nuisance. State ex rel. Summrell v. Carolina-Virginia Racing Ass'n, 239 N.C. 591, 80 S.E.2d 638 (1954).

Evidence Supporting Abatement. — The evidence disclosed that defendant operated a tourist camp with filling station, dining room and dance hall in front, and cabins in the rear, that the camp was on highway in a thickly settled rural community, that whiskey and contraceptives were sold, that drunken men and women were seen nightly at the place, and seen to go in the cabins in pairs and stay for a short time, that the community was constantly awakened at night by loud and boisterous conduct and profanity, that fighting occurred between drunken men and women, with many of both sexes nude or indecently clad, and that the general reputation of the place was bad, is held ample sufficient to be submitted to the jury upon the issue of whether the place constituted a nuisance against public morals as defined by § 19-1, and to support a judgment for its abatement in accordance with this section in an action brought by the solicitor as relator. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

Lease Is Made in Contemplation of Section. — A lease contract will be held to have been made in contemplation of the statute in effect at the time of the execution of the lease, providing for the abatement of nuisance against public morals, and the lessor is subject to the rights of the State to padlock the premises in accordance with the statute if they are used in operating a nuisance as defined by the act. Barker v. Palmer, 217 N.C. 519, 8 S.E.2d 610 (1940).

§ 19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction. — The action, provided for in this Chapter, shall be brought in the superior court of the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application for a preliminary injunction may be made to the court in which the action is filed which court shall grant a hearing within 10 days after the filing of said application. (1977, c. 819, s. 4.)

§ 19-2.3. Temporary order restraining removal of personal property from premises; service; punishment. — Where such application for a preliminary injunction is made, the court may, on application of the complainant showing good cause, issue an ex parte temporary restraining order in accordance with G.S. 1A-1, Rule 65(b), preserving the status quo and restraining the defendant and all other persons from removing or in any manner interfering with any evidence specifically described, or in any manner removing or interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court granting or refusing such preliminary injunction and until further order of the court thereon. Nothing herein shall be interpreted to allow the prior restraint of the distribution of any matter or the sale of the stock in trade, but an inventory and full accounting of all business transactions involving alleged obscene or lewd matter thereafter shall be required.

Any person, firm, or corporation enjoined pursuant to this section may file with the court a motion to dissolve any temporary restraining order. Such a motion shall be heard within 24 hours of the time a copy of the motion is served on the complaining party, or on the next day the superior courts are open in the district, whichever is later. At such hearing the complaining party shall have the burden of showing why the restraining order should be continued.

In the event a temporary restraining order is issued, it may be served in accordance with the provisions of G.S. 1A-1, Rule 4, or may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by such service under said Rule 4, delivery and posting. The officer serving such temporary restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such temporary restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. (1977, c. 819, s. 4.)

§ 19-2.4. Notice of hearing on preliminary injunction; consolidation. — A copy of the complaint, together with a notice of the time and place of the hearing of the application for a preliminary injunction, shall be served upon the defendant at least five days before such hearing. The place may also be served by posting such papers in the same manner as is provided for in G.S. 19-2.3 in the case of a temporary restraining order. If the hearing is then continued at the instance of any defendant, the temporary restraining order may be continued as a matter of course until the hearing.

Before or after the commencement of the hearing of an application for a preliminary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the preliminary injunction; provided, however, the defendant shall be entitled to a jury trial if requested. (1977, c. 819, s. 4.)

§ 19-2.5. Hearing on the preliminary injunction; issuance. — If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court, the court shall issue a preliminary injunction restraining the defendant and any other person from continuing the nuisance and effectually enjoining its use thereafter for the purpose of conducting any such nuisance. (1977, c. 819, s. 4.)

§ 19-3. Priority of action; evidence. — (a) The action provided for in this Chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions.

(b) In such action, an admission or finding of guilt of any person under the criminal laws against lewdness, assignation, prostitution, gambling, the illegal possession or sale of intoxicating liquors, or the illegal possession or sale of substances proscribed by the North Carolina Controlled Substances Act, at any such place, is admissible for the purpose of proving the existence of said nuisance, and is evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance.

(c) At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. (Pub. Loc. 1913, c. 761, s. 27; 1919, c. 288; C. S., s. 3182; 1971, c. 528, s. 6; 1973, c. 47, s. 2; 1977, c. 819, s. 5.)

Cross Reference. — As to certain evidence relative to keeping disorderly houses admissible in criminal proceedings, see § 14-188.

Editor's Note. — The 1977 amendment rewrote this section.

Evidence of the general reputation of the place in question is competent in an action to abate a public nuisance. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

This section, which makes evidence of the general reputation of the place admissible for the purpose of proving a nuisance, is not applicable where the defendant is not charged with maintaining a nuisance. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

Hence, evidence of the general reputation of defendant's premises is inadmissible in prosecutions for liquor-law violations involving a charge of unlawful sale or possession of intoxicants at particular premises. State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965).

§ 19-4. Violation of injunction; punishment. — In case of the violation of any injunction granted under the provisions of this Chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (Pub. Loc. 1913, c. 761, s. 28; 1919, c. 288; C. S., s. 3183.)

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

§ 19-5. Content of final judgment and order. — If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

The provisions of this Article, relating to the closing of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not, in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited. (Pub. Loc. 1913, c. 761, s. 29; 1919, c. 288; C. S., s. 3184; 1977, c. 819, s. 6.)

Editor's Note. — The 1977 amendment rewrote this section.

§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of lease. — Lewd matter is contraband, and there are no property rights therein. All personal property, including all money and other considerations, declared to be a nuisance under the provisions of G.S. 19-1.3 and other sections of this Article, are subject to forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such property including moneys may be traced to and shall be recoverable from persons who, under G.S. 19-2.4, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendant or defendants in legal proceedings brought pursuant to this Article, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a nuisance under this Article. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and county governments wherein such activity took place, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare; provided, however, that no provision of this Article shall authorize the recovery of any moneys or gross income received from the sale of any book, magazine, or exhibition of any motion picture prior to the issuance of a preliminary injunction. Where the action is brought pursuant to this Article, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in maintaining the nuisance. Costs of abatement include, but are not limited to, reasonable attorney's fees and court costs.

If it is judicially found after an adversary hearing pursuant to this Article that a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, prostitution, gambling, sale or possession of illegal intoxicating liquors or substances proscribed under the North Carolina Controlled Substances Act, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner. (Pub. Loc. 1913, c. 761, s. 30; 1919, c. 288; C. S., s. 3185; 1977, c. 819, s. 7.)

Editor's Note. — The 1977 amendment, effective Aug. 1, 1977, rewrote this section.

Local Modification. — McDowell: 1959, c. 590, s. 3.

Applied in State ex rel. Bowman v. Fipps, 266 N.C. 535, 146 S.E.2d 395 (1966).

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938); State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

§ 19-7. How order of abatement may be canceled. — If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (Pub. Loc. 1913, c. 761, s. 31; 1919, c. 288; C. S., s. 3186.)

Stated in State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

§ 19-8. Costs. — The prevailing party shall be entitled to his costs. The court shall tax as part of the costs in any action brought hereunder such fee for the attorney prosecuting or defending the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (Pub. Loc. 1913, c. 761, s. 32; 1919, c. 288; C. S., s. 3187; 1977, c. 819, s. 8.)

Local Modification. — McDowell: 1959, c. 590, s. 4.

Editor's Note. — The 1977 amendment added the present first sentence and inserted "or defending" in the present second sentence.

Fee Discretionary. — The allowance of a fee is a matter in the discretion of the trial judge. State ex rel. Bowman v. Fippa, 266 N.C. 535, 146 S.E.2d 395 (1966).

Cited in Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938); State v. Murphy, 235 N.C. 503, 70 S.E.2d 498 (1952).

§ 19-8.1. Immunity. — The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (i) Has no financial interest in the place wherein he is so employed, and (ii) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this Chapter, including pretrial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. (1977, c. 819, s. 9.)

§ 19-8.2. Right of entry. — Authorized representatives of the Commission for Health Services, any local health department or the Department of Human Resources, upon presenting appropriate credentials to the owner, operator, or agent in charge of a place described in G.S. 19-1.2, are authorized to enter without delay and at any reasonable time any such place in order to inspect and investigate during the regular hours of operation of such place. (1977, c. 819, s. 9.)

§ 19-8.3. Severability. — If any section, subsection, sentence, or clause of this Article is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Article. It is hereby declared that this Article would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. (1977, c. 819, s. 10.)

APPENDIX A

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 5,7)

Chapter 7, Article 1.1 - Obscene Movie and Obscene Pictorial Publication Abatement - of the Arizona Revised Code, added by Laws 1977, Ch. 125, effective May 31, 1977

. . . . . A-35 thru A-38

CHAPTER 7.—SPECIAL ACTIONS AND PROCEEDINGS IN WHICH THE STATE IS A PARTY

ARTICLE 1.1. OBSCENE MOVIE AND OBSCENE PICTORIAL PUBLICATION ABATEMENT

Sec.
12-811. Definitions.
12-812. Nuisance.
12-813. Abatement of nuisance.
12-814. Procedure in injunction action.
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12-816. Content by judgment and order.
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12-841. Jurisdiction.
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ARTICLE 4. CONTEMPT OF COURT

12-863.01. Punishment for persons in contempt of court for failure to provide child support.

ARTICLE 5. ESCHEAT

12-888. Concurrent authority of the department of revenue.
12-889. Escheated property; rules and regulations; salary.

ARTICLE 1. ABATEMENT OF BAWDY HOUSES

Cross References
Criminal actions involving conduct constituting criminal offenses, see § 13-102.

§ 12-810. Violation as contempt; classification

A violation or disobedience of either an injunction or order expressly provided for by this article shall be punished as a class 2 misdemeanor. As amended Laws 1978, Ch. 201, § 77, eff. Oct. 1, 1978.

For application of Laws 1978, Ch. 201, effective October 1, 1978, see note following § 1-215.
For effective date provision of Laws 1978, Ch. 201, see note following § 1-215.

Cross References
Classification of offenses, see § 13-601 et seq.
Fines, see § 13-801 et seq.
Sentences of imprisonment, see § 13-701 et seq.

ARTICLE 1.1. OBSCENE MOVIE AND OBSCENE PICTORIAL PUBLICATION ABATEMENT

Article 1.1, consisting of §§ 12-811 to 12-818, was added by Laws 1977, Ch. 125, § 9, effective May 31, 1977.

Cross References
Obscenity and indecency offenses, see § 13-531 et seq.

§ 12-811. Definitions

In this article, unless the context otherwise requires:

1. "Motion picture film" means any film or plate negative, film or plate positive, film or tape designed to be projected on a screen for exhibition, or films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen.

2. "Nuisance" means any place for the sale or exhibition of obscene motion picture films or pictorial publications.

3. "Obscene motion picture film or obscene pictorial publication" means any motion picture, film, video reproduction or pictorial publication which would constitute an obscene item as defined in § 13-3501.

4. "Person" means any individual, association, partnership, corporation, trustee, lessee, agent or assignee.

5. "Pictorial publication" means any book, magazine or pamphlet containing one or more drawings, pictures, photographs or illustrations.

6. "Place" means any building, enclosure or any separate part or portion thereof whether permanent or not or the ground itself. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977. As amended Laws 1978, Ch. 201, § 78, eff. Oct. 1, 1978.

For application of Laws 1978, Ch. 201, effective October 1, 1978, see note following § 1-215.
For effective date provision of Laws 1978, Ch. 201, see note following § 1-215.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

Cross References
Nuisance,
Prevention or abatement, see Const. Art. 6, § 14.
Public, see § 13-601 et seq.

§ 12-812. Nuisance

A. Any person who maintains, establishes or conducts a nuisance, or aids or abets therein, and the agent or lessee of any interest in any such nuisance together with the persons in control of any such nuisance by any such agent or lessee can be enjoined from maintaining a nuisance pursuant to this article.

B. Upon receiving notice pursuant to § 12-814, such persons are deemed to have knowledge of the nuisance and are liable for its maintenance. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Cross References
Proceeds, forfeiture upon knowledge of nuisance, after issuance of injunction, see § 12-817.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-813. Abatement of nuisance

If a nuisance exists, the attorney general, the county attorney of the county in which such nuisance exists or the city attorney of the city in which such nuisance exists may bring an action in the name of the state to abate such nuisance and to enjoin the person maintaining the nuisance from further maintenance. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Cross References
Venue, see § 12-814.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-814. Procedure in injunction action

A. An action instituted pursuant to § 12-813 shall be brought in the superior court of the county in which the property is located. At the commencement of the action a verified complaint alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court.

B. After the filing of the complaint, application for a preliminary injunction may be made to the court which shall grant a hearing within twenty days after the filing. Where such application for a preliminary injunction is made, the court may, on application of the complainant, issue an ex parte restraining order, restraining the defendant from removing or in any manner interfering with any obscene motion picture film or obscene pictorial publication or other item directly related to the conduct or maintenance of the place where such nuisance is alleged to exist and which is alleged in the complaint to constitute a nuisance until further order of the court. The restraining order may be served by handing to and leaving a copy of such order with the manager or person in charge of such place. Any violation of such restraining order is a contempt of court.

C. A copy of the complaint, together with a notice of the time and place of the hearing of the application for a preliminary injunction shall be served upon the defendant at least fifteen days before such hearing.

D. Before or after the commencement of the hearing of an application for a preliminary injunction, the court on application of the defendant, may order that the trial of the action on the merits be advanced and consolidated with the hearing on the application for a preliminary injunction. Evidence which would be admissible at trial shall become a part of the record and need not be reintroduced at the trial.

E. If upon hearing the allegations of the petition it appears to the court that there is sufficient evidence to establish that a nuisance as alleged in the complaint exists and that the plaintiff is likely to prevail at the trial on the merits, the court shall issue a preliminary injunction without additional bond restraining the defendant from continuing the nuisance. Such order shall also continue in effect for such further period of the restraining order if already issued, or, if not issued, it shall include an order restraining for such period the removal or interference with any obscene motion picture film or obscene pictorial publication or other item directly related to the obscene motion picture film or obscene pictorial publication including, but not limited to, promotional material for such film or publication and printing plates used to print such publication. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Cross References
Notice, knowledge of nuisance and liability for maintenance, see § 12-812.
Proceeds, forfeiture upon knowledge of nuisance after issuance of injunction, see § 12-817.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-815. Priority of action; evidence; costs

A. An action instituted pursuant to this article shall have precedence over all other cases except criminal actions, election contests, injunctions, habeas corpus proceedings, temporary restraining orders and juvenile proceedings.

B. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall enjoin the defendant from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere. Such judgment shall also provide that the defendant reimburse the plaintiff for the plaintiff's expenses in bringing the action, including attorney's fees and court costs. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Cross References
Accounting as to proceeds upon issuance of judgment, see § 12-817.

Library References
Nuisance ⇐78.
C.J.S. Nuisance, § 108.

§ 12-816. Content of judgment and order

If the existence of a nuisance is admitted or established in an action pursuant to this article, an order of abatement shall be entered as a part of the judgment in the case. The order of abatement shall direct the removal from the place of the motion picture or pictorial publication found to be obscene and items directly related to such motion picture film or pictorial publication and shall direct the sheriff of the county in which the action was brought to seize and destroy such film, publication and other items directly related to such film or publication including, but not limited to, promotional material for such film or publication and printing plates used to print the publication. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-817. Civil penalty; forfeiture; accounting

A. Obscene motion picture films and obscene pictorial publications pursuant to this article are contraband and are not subject to any property rights.

B. Any and all monies received in payment for obtaining or viewing any obscene motion picture films and obscene pictorial publications are subject to forfeiture to the county in which the abatement action is brought as restitution for damages done to the public welfare, public health and public morals. Such monies may be traced to and shall be recoverable from those persons as set forth in § 12-812 who have knowledge of the nuisance, from and after the issuance of a preliminary injunction against the conduct of such persons pursuant to § 12-814.

C. Upon the issuance of a judgment pursuant to § 12-815, subsection B, the defendants named in such judgment shall make an accounting of all monies received by them in payment for obtaining or viewing obscene motion picture films or obscene pictorial publications subject to such judgment. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Library References
Nuisance ⇐78.
C.J.S. Nuisance § 108.

§ 12-818. Petition by commercial operators or qualified electors for action

If the attorney general, a county attorney or a city attorney receives a petition alleging the existence of a nuisance subject to the provisions of this article and determines that there are reasonable grounds to believe that such a nuisance exists, an action to abate such nuisance shall be brought forthwith. Such petition may be signed by only persons who operate commercial enterprises within a one-half mile radius of the location of the alleged nuisance or who are qualified electors whose voting address is within a one-half mile radius of the location of the alleged nuisance. Such petition must be signed by at least one hundred of the persons eligible to sign or fifty per cent of the persons eligible to sign, whichever is greater. Added Laws 1977, Ch. 125, § 9, eff. May 31, 1977.

Library References
Nuisance ⇐78.
C.J.S. Nuisances § 108.

APPENDIX B

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 19)

Title 9, Chapter 43, Subchapter B - Obscenity - (Articles 43.21, 43.22, 43.23 and 43.24) of Texas Penal Code, enacted by Acts 1973, 63rd Leg p. 883, Ch. 399, effective January 1, 1974 . . . . . B-1 thru B-3

§ 43.21. Definitions

In this subchapter:

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to a prurient interest in sex, nudity, or excretion;

(B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and

(C) is utterly without redeeming social value.

(2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a statue or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment, or machine.

(3) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) "Distribute" means to transfer possession, whether with or without consideration.

~~(5)~~ "Commercially distribute" means to transfer possession for valuable consideration.

§ 43.22. Obscene Display or Distribution

(a) A person commits an offense if he intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person is present who will be offended or alarmed by the display or distribution.

(b) An offense under this section is a Class C misdemeanor.

§ 43.23. Commercial Obscenity

(a) A person commits an offense if, knowing the content of the material:

(1) he sells, commercially distributes, commercially exhibits, or possesses for sale, commercial distribution, or commercial exhibition any obscene material;

(2) he presents or directs an obscene play, dance, or performance or participates in that portion of the play, dance, or performance that makes it obscene; or

(3) he hires, employs, or otherwise uses a person under the age of 17 years to achieve any of the purposes set out in Subdivisions (1) and (2) of this subsection.

(b) It is an affirmative defense to prosecution under this section that the obscene material was possessed by a person having scientific, educational, governmental, or other similar justification.

(c) An offense under this section is a Class B misdemeanor unless committed under Subsection (a)(3) of this section, in which event it is a Class A misdemeanor.

§ 43.24. Sale, Distribution, or Display of Harmful Material to Minor

(a) For purposes of this section:

(1) "Minor" means an individual younger than 17 years.

(2) "Harmful material" means material whose dominant theme taken as a whole:

(A) appeals to the prurient interest of a minor, in sex, nudity, or excretion;

(B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) is utterly without redeeming social value for minors.

(b) A person commits an offense if, knowing that the material is harmful:

(1) and knowing the person is a minor, he sells, distributes, exhibits, or possesses for sale, distribution, or exhibition to a minor harmful material;

(2) he displays harmful material and is reckless about whether a minor is present who will be offended or alarmed by the display; or

(3) he hires, employs, or uses a minor to do or accomplish or assist in doing or accomplishing any of the acts prohibited in Subsection (b)(1) or (b)(2) of this section.

(c) It is a defense to prosecution under this section that:

(1) the sale, distribution, or exhibition was by a person having scientific, educational, governmental, or other similar justification; or

(2) the sale, distribution, or exhibition was to a minor who was accompanied by a consenting parent, guardian, or spouse.

(d) An offense under this section is a Class A misdemeanor unless it is committed under Subsection (b)(3) of this section in which event it is a felony of the third degree.

APPENDIX C

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE]9,22)

Chapter 18, - Search Warrants - Code of Criminal Procedure, 1965 as amended by Acts 1973, 63rd Leg. Ch. 399 Article 2 (E), effective January 1, 1974. . . . . C-1 thru C-7

"CHAPTER EIGHTEEN—SEARCH WARRANTS

Art.

18.01. Search warrant.
18.02. Grounds for issuance.
18.03. Search warrant may order arrest.
18.04. Contents of warrant.
18.05. Warrants for fire marshals and health officers.
18.06. Warrant executed without delay.
18.07. Days allowed for warrant to run.
18.08. Power of officer executing warrant.
18.09. Shall seize accused and property.
18.10. How return made.
18.11. Custody of property found.
18.12. Magistrate shall investigate.
18.13. Shall discharge defendant.
18.14. Examining trial.
18.15. Certify record to proper court.
18.16. Preventing consequences of theft.
18.17. Disposition of abandoned or unclaimed property.
18.18. Disposition of gambling paraphernalia, prohibited weapon, criminal instrument.
18.19. Disposition of certain weapons.

"Article 18.01. Search warrant

"(a) A 'search warrant' is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate.

"(b) No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance. A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

"Art. 18.02. Grounds for issuance

"A search warrant may be issued to search for and seize:

"(1) property acquired by theft or in any other manner which makes its acquisition a penal offense;

"(2) property specially designed, made, or adapted for or commonly used in the commission of an offense;

"(3) arms and munitions kept or prepared for the purpose of insurrection or riot;

"(4) weapons prohibited by the Penal Code;

"(5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;

"(6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;

"(7) drugs kept, prepared, or manufactured in violation of the laws of this state;

"(8) any property the possession of which is prohibited by law;

"(9) implements or instruments used in the commission of a crime.

"Art. 18.03. Search warrant may order arrest

"If the facts presented to the magistrate under Article 18.02 of this chapter also establish the existence of probable cause that a person has committed some offense under the laws of this state, the search warrant may, in addition, order the arrest of such person.

"Art. 18.04. Contents of warrant

"A search warrant issued under this chapter shall be sufficient if it contains the following requisites:

"(1) that it run in the name of 'The State of Texas';

"(2) that it identify, as near as may be, that which is to be seized and name or describe, as near as may be, the person, place, or thing to be searched;

"(3) that it command any peace officer of the proper county to search forthwith the person, place, or thing named; and

"(4) that it be dated and signed by the magistrate.

"Art. 18.05. Warrants for fire marshals and health officers

"(a) A search warrant may be issued to the fire marshal or health officer of the state or of any county, city, or other political subdivision for the purpose of allowing the inspection of any specified premises to determine the presence of a fire or health hazard or a violation of any fire or health regulation, statute, or ordinance.

"(b) A search warrant may not be issued under this article except upon the presentation of evidence of probable cause to believe that a fire or health hazard or violation is present in the premises sought to be inspected.

"(c) In determining probable cause, the magistrate is not limited to evidence of specific knowledge, but may consider any of the following:

"(1) the age and general condition of the premises;

"(2) previous violations or hazards found present in the premises;

"(3) the type of premises;

"(4) the purposes for which the premises are used; and

"(5) the presence of hazards or violations in and the general condition of premises near the premises sought to be inspected.

"Art. 18.06. Execution of warrants

"(a) A peace officer to whom a search warrant is delivered shall execute it without delay and forthwith return it to the proper magistrate. It must be executed within three days from the time of its issuance, and shall be executed within a shorter period if so directed in the warrant by the magistrate.

"(b) The officer shall, upon going to the place ordered to be searched or before seizing any property for which he is ordered to make the search, give notice of his purpose to the person who has charge of or is an inmate of the place or who has possession of the property described in the warrant.

"Art. 18.07. Days allowed for warrant to run

"The time allowed for the execution of a search warrant shall be three whole days, exclusive of the day of its issuance and of the day of its execution. The magistrate issuing a search warrant under the provisions of this chapter shall endorse on such search warrant the date and hour of the issuance of the same.

"Art. 18.08. Power of officer executing warrant

"In the execution of a search warrant, the officer may call to his aid any number of citizens in his county, who shall be bound to aid in the execution of the same.

"Art. 18.09. Shall seize accused and property

"When the property which the officer is directed to search for and seize is found he shall take possession of the same and carry it before the magistrate. He shall also arrest any person whom he is directed to arrest by the warrant and immediately take such person before the magistrate.

"Art. 18.10. How return made

"Upon returning the search warrant, the officer shall state on the back of the same, or on some paper attached to it, the manner in which it has been executed and shall likewise deliver to the magistrate an inventory of the property taken in his possession under the warrant.

"Art. 18.11. Custody of property found

"When a warrant has been issued to search a suspected place and there be found any property as alleged to have been there kept or concealed, the same shall be safely kept by the officer seizing the same, subject to the further order of the magistrate.

"Art. 18.12. Magistrate shall investigate

"The magistrate, upon the return of a search warrant, shall proceed to try the questions arising upon the same, and shall take testimony as in other examinations before him.

"Art. 18.13. Shall discharge defendant

"If the magistrate be not satisfied, upon investigation, that there was good ground for the issuance of the warrant, he shall discharge the defendant and order restitution of the property taken from him, except for criminal instruments. In such case, the criminal instruments shall be kept by the sheriff subject to the order of the proper court.

"Art. 18.14. Examining trial

"The magistrate shall proceed to deal with the accused as in other cases before an examining court if he is satisfied there was good ground for issuing the warrant.

"Art. 18.15. Certify record to proper court

"The magistrate shall keep a record of all the proceedings had before him in cases of search warrants, and shall certify the same and deliver them to the clerk of the court having jurisdiction of the case, before the next term of said court, and accompany the same with all the original papers relating thereto, including the certified schedule of the property seized.

"Art. 18.16. Preventing consequences of theft

"All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay.

"Art. 18.17. Disposition of abandoned or unclaimed property

"(a) All unclaimed or abandoned personal property of every kind, except whiskey, wine and beer, seized by any state or county peace officer in the State of Texas which is not held as evidence to be used in any pending case and has not been ordered destroyed or returned to the person entitled to possession of the same by a magistrate, which shall remain unclaimed for a period of 30 days shall be delivered for sale to the purchasing agent of the county in which the property was seized. If the county has no purchasing agent, then such property shall be sold by the sheriff of the county.

"(b) The purchasing agent or sheriff of the county, as the case may be, shall mail a notice to the last known address of the owner of such property by certified mail. Such notice shall describe the property being held, give the name and address of the officer holding such property, and shall state that if the owner does not claim such property within six months from the date of the notice such property will be sold and the proceeds of such sale, after deducting the reasonable expense of keeping such property and the costs of the sale, placed in the county treasury.

"(c) If the owner of such property is unknown or if the address of the owner is unknown, then the purchasing agent or the sheriff, as the case may be, shall cause to be published once in a paper of general circulation in the county a notice containing a description of the property held, the name of the owner if known, the name and address of the officer holding such property, and a statement that if the owner does not claim such property within six months from the date of the publication such property will be sold and the proceeds of such sale, after deducting the reasonable expense of keeping such property and the costs of the sale, placed in the county treasury.

"(d) The sale of any property hereunder shall be preceded by a notice published once at least three weeks prior to the date of such sale in a newspaper of general circulation in the county where the sale is to take place, stating the description of the property, the names of the owner if known, and the date and place that such sale will occur. If the purchasing agent or sheriff, as the case may be, shall consider any bid as insufficient, he need not sell such property but may decline such bid and reoffer such property for sale.

"(e) The real owner of any property sold shall have the right to file a claim to the proceeds of such sale with the commissioners court of the county in which the sale took place. If the claim is allowed by the commissioners court, the county treasurer shall pay the owner such funds as were paid into the treasury of the county as proceeds of the sale. If the claim is denied by the commissioners court or if said court fails to act upon such claim within 90 days, the claimant may sue the county treasurer in a court of competent jurisdiction in the county, and upon sufficient proof of ownership, recover judgment against such county for the recovery of the proceeds of the sale.

"Art. 18.18. Disposition of gambling paraphernalia, prohibited weapon, criminal instrument

"(a) Following the final conviction of a person for possession of a gambling device or equipment, altered gambling equipment, or gambling paraphernalia, for an offense involving a criminal instrument, or an offense involving a prohibited weapon, the court entering the judgment of conviction shall order that the machine, device, gambling equipment or gambling paraphernalia, instrument, or weapon be destroyed or forfeited to the state. If forfeited, the court shall order the contraband delivered to the state, any political subdivision of the state, or to any state institution or agency. If gambling proceeds were seized, the court shall order them forfeited to the state and shall transmit them to the grand jury of the county in which they were seized for use in investigating alleged violations of the Penal Code, or to the state, any political subdivision of the state, or to any state institution or agency.

"(b) If there is no prosecution or conviction following seizure, the magistrate to whom the return was made shall notify in writing the person found in possession of the alleged gambling device or equipment, altered gambling equipment or gambling paraphernalia, gambling proceeds, prohibited weapon, or criminal

instrument to show cause why the property seized should not be destroyed or the proceeds forfeited.

"(c) The magistrate shall include in the notice a detailed description of the property seized and the total amount of alleged gambling proceeds; the name of the person found in possession; the address where the property or proceeds were seized; and the date and time of the seizure.

"(d) The magistrate shall send the notice by registered or certified mail, return receipt requested, to the person found in possession at the address where the property or proceeds were seized. If no one was found in possession, or the possessor's address is unknown, the magistrate shall post the notice on the courthouse door.

"(e) Any person interested in the alleged gambling device or equipment, altered gambling equipment or gambling paraphernalia, gambling proceeds, prohibited weapon, or criminal instrument seized must appear before the magistrate on the 20th day following the date the notice was mailed or posted. Failure to timely appear forfeits any interest the person may have in the property or proceeds seized, and no person after failing to timely appear may contest destruction or forfeiture.

"(f) If a person timely appears to show cause why the property or proceeds should not be destroyed or forfeited, the magistrate shall conduct a hearing on the issue and determine the nature of property or proceeds and the person's interest therein. Unless the person proves by a preponderance of the evidence that the property or proceeds is not gambling equipment, altered gambling equipment, gambling paraphernalia, gambling device, gambling proceeds, prohibited weapon, or criminal instrument, and that he is entitled to possession, the magistrate shall dispose of the property or proceeds in accordance with Paragraph (a) of this article.

"(g) For purposes of this article:

"(1) 'criminal instrument' has the meaning defined in the Penal Code;

"(2) 'gambling device or equipment, altered gambling equipment or gambling paraphernalia' has the meaning defined in the Penal Code;

"(3) 'prohibited weapon' has the meaning defined in the Penal Code.

"Art. 18.19. Disposition of certain weapons

"(a) Weapons seized in connection with an offense involving the use of a deadly weapon or an offense under Penal Code Chapter 46 shall be held by the law enforcement agency making the seizure, subject to the following provisions, unless:

"(1) the weapon is a prohibited weapon identified in Penal Code Chapter 46, in which event Article 18.18 of this code applies; or

"(2) the weapon is alleged to be stolen property, in which event Chapter 47 of this code applies.

"(b) When a weapon described in Paragraph (a) of this article is seized, and the seizure is not made pursuant to a search or arrest warrant, the person seizing the same shall prepare and deliver to a magistrate a written inventory of each weapon seized.

"(c) If there is no prosecution or conviction for an offense involving the weapon seized, the magistrate to whom the seizure was reported shall notify in writing the person found in possession that he is entitled to the weapon upon request to the court in which he was convicted. If the weapon is not requested within 60 days after notification, the magistrate may order the weapon destroyed or forfeited to the state for use by the law enforcement agency holding the weapon.

"(d) A person convicted under Penal Code Chapter 46 is entitled to the weapon seized upon request to the law enforcement agency holding the weapon. However, the court entering the judgment of conviction may order the weapon destroyed or forfeited to the state for use by the law enforcement agency holding the weapon if:

"(1) the person does not request the weapon within 60 days after his release from jail or the date of the judgment of conviction if he was not imprisoned; or

"(2) the person has been previously convicted under Penal Code Chapter 46; or

"(3) the weapon is one defined as a prohibited weapon under Penal Code Chapter 46.

"(e) If the person found in possession of a weapon is convicted of an offense involving the use of a deadly weapon or under Penal Code Chapter 46, the court entering judgment of conviction may order destruction of the weapon or forfeiture to the state for use by the law enforcement agency holding the weapon."

APPENDIX D

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 19,85)

Title 76 - Injunctions - (2) In Particular Cases, Articles 4664, 4665, 4666, and 4667, of Civil Statutes of Texas prior to January 1, 1974 amendments. . . . . D-1 and D-2

Articles 4664 and 4667, of Civil Statutes of Texas, as amended by Acts 1973, 63rd Leg, Ch. 399 Article 2 (H) and 2(I), effective January 1, 1974. . . . . D-3

2. IN PARTICULAR CASES

Art. 4664. Nuisance

Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or to which persons resort in assembling of two or more persons to the room for the purpose of drinking intoxicating liquor, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons resort for the purpose of gambling, or for the purpose of prostitution, is hereby declared to be a common nuisance. Any person who knowingly maintains or assists in maintaining such a place is guilty of maintaining a nuisance. Acts 2nd C.S.1923, p. 57.

Art. 4665. Nuisance; evidence

Proof that any of said prohibited acts are frequently committed in any of said places shall be prima facie evidence that the proprietor knowingly permitted the same, and evidence that persons have been convicted of committing any said act in a hotel, boarding house or rooming house, is admissible to show knowledge on the part of the defendants that this law is being violated in the house. The original papers and judgments or certified copies thereof in such cases of convictions may be used in evidence in the suit for injunction and oral evidence is admissible to show that the offense for which said parties were convicted was committed in said house. Evidence of general reputation of said houses shall also be admissible to prove the existence of said nuisance. Id.

Art. 4666. Nuisance; prosecution

Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and

Art. 4667. 4685-93 Gaming and disorderly houses

The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall be enjoined at the suit of either the State or any citizen thereof:

1. For gaming or keeping or exhibiting games prohibited by law.

2. For keeping, being interested in, aiding or abetting the keeping of a bawdy or disorderly house, as those terms are defined in the Penal Code.

3. For carrying on bucket shops as defined in the Penal Code, or the habitual use by or permitting to remain in any such bucket shop, any telegraph or telephone wires or instruments, under circumstances prohibited by the Penal Code.

4. For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by the Penal Code.

Any person who may use or be about to use, or who may aid or abet another in the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of. As amended Acts 1937, 45th Leg., p. 664, ch. 331, § 1.

2. IN PARTICULAR CASES

Art. 4664. Nuisance

Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or where intoxicating liquors are furnished to minors or to students of any educational institution, or where persons habitually resort for the purpose of prostitution or to gamble as prohibited by the Penal Code, is hereby declared to be a common nuisance. Any person who knowingly maintains such a place is guilty of maintaining a nuisance. Amended by Acts 1973, 63rd Leg., p. 988, ch. 399, § 2(I), eff. Jan. 1, 1974.

Art. 4667. 4685-93 Injunctions to abate public nuisances

(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:

(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;

(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;

(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;

(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.

(b) Any person who may use or be about to use, or who may be a party to the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney or City Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of.
Amended by Acts 1973, 63rd Leg., p. 989, ch. 399, § 2(J), eff. Jan. 1, 1974; Subsec. (b) amended by Acts 1975, 64th Leg., p. 1962, ch. 647, § 1, eff. June 19, 1975.

APPENDIX E

(REFERENCE: AMICUS CURIAE BRIEF AT PAGE 7,10,14,15,19,21)

Texas Penal Code, Article 527, sections 1-13, Obscene Articles - repealed by Acts 1973, 63rd Leg. Ch. 399, section 3, effective Jan 1, 1974. . . . . E-1 thru E-5

Art. 527. [509] Obscene articles

Definitions

Section 1. As used in this Article:

(A) "Obscene" material means material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.

(B) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(D) "Person" means any individual, partnership, firm, association, corporation or other legal entity, or any agent or servant thereof.

(E) "Distribute" means to transfer possession of, whether with or without consideration.

(F) "Knowingly" means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

Affirmative defense

Sec. 2. It is not innocent but calculated purveyance which is prohibited. This article shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise prescribed by this article when such possession, distribution, or conduct occurs in the course of law enforcement activities or in the course of bona fide scientific, educational, or comparable research or study or in the course of employment as a moving picture machine operator, or assistant operator, in a motion picture theater in connection with a motion picture film or show exhibited in said theater if such operator or assistant operator has no financial interest in the motion picture theater wherein he is so employed other than his wages received or owed, or like circumstances of justification where the possession, distribution, or conduct is not limited to the subject matter's appeal to prurient interests.

General sale or distribution, etc., of obscene matter: penalty

Sec. 3. Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

Distribution to minors; law governing

Sec. 4. Notwithstanding any of the provisions of this bill, the distribution of obscene matter to minors shall be governed by Senate Bill 661 [1] enacted by the 61st Legislature and approved by the Governor. In case of any conflict between the provisions of this bill and said Senate Bill 661, the provisions of the latter shall prevail.

[1] Acts 1969, 61st Leg., p. 850, ch. 284, §§ 1 to 16, classified as Vernon's Ann.P.C. art. 534b.

Hiring, employing, etc., minor to engage in acts described in Section 3: penalty

Sec. 5. Every person who, with knowledge that a person is a minor under 18 years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under 18 years of age, hires, employs, or uses such minor to do or assist in doing any of the acts described in Section 3, is guilty of a misdemeanor.

Conspiracy

Sec. 6. A conspiracy of two or more persons to commit any of the crimes prescribed by this Act is punishable as a felony. Any court having jurisdiction of the conspiracy crime has concurrent jurisdiction to try all misdemeanor crimes committed in furtherance of the conspiracy.

Special verdict

Sec. 7. The jury, or the court, if a jury trial is waived, shall render a general verdict, and must also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the _____ (title or description of matter) to be obscene," or "We find the _____ (title or description of matter) not to be obscene," as they may find each item is or is not obscene. A special verdict shall not be admissible as evidence in any other proceeding, nor shall it be res judicata of any question in any other proceeding.

Punishment for violation of Sections 3, 5, and 6

Sec. 8. (A) Every person who violates Section 3 is punishable by a fine of not more than $1,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $10,000, or by confinement in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both fine and confinement. If such person has previously been convicted of a violation of this Act, a violation of Section 3 is punishable as a felony and by a fine of not more than $2,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $25,000, or by imprisonment in the penitentiary for not exceeding five years or both fine and imprisonment.

(B) Every person who violates Section 5 is punishable by a fine of not more than $2,000 or by confinement in the county jail for not more than one year, or by both fine and confinement. If such person has been previously convicted of a violation of this Act, a violation of Section 5 is punishable as a felony and by a fine of not more than $5,000, or by imprisonment in the penitentiary not exceeding five years, or both fine and imprisonment.

(C) Every person who violates Section 6 is punishable by a fine of not more than $5,000, or by imprisonment in the penitentiary not exceeding five years, or by both such fine and imprisonment.

Search warrant for seizure of obscene material

Sec. 9. (a) An affidavit for a search warrant shall be filed with the magistrate describing the matter sought to be seized in detail. Where practical, the matter alleged to be obscene shall be attached to the affidavit for search warrant so as to afford the magistrate the opportunity to examine such material.

(b) Upon the filing of an affidavit for a search warrant, the magistrate shall determine, by examination of the matter sought to be seized, if attached, by an examination of the affidavit describing the matter, or by such other manner or means that he deems necessary, if probable cause exists for a hearing upon the question of the issuance of a search warrant. If the magistrate determines that probable cause exists for a hearing, he shall issue notice to the person or persons in possession of the matter, setting a time and place for a hearing to determine if a search warrant shall issue.

(c) The hearing on the affidavit for the issuance of a search warrant shall be at such time and upon such reasonable notice given in such manner as the magistrate may direct. The magistrate's order as to notice and hearing shall give the adverse party the right to appear and produce the matter described in the affidavit for a search warrant, but shall not in any manner require him to produce the said matter.

(d) The magistrate shall further have authority to render such orders as reasonable and necessary to protect the court's jurisdiction over the matter described in the affidavit for a search warrant and may issue orders requiring the matter not to be removed from its location as described in the application for a search warrant or to make any change, alteration or destruction of the matter until such time as a hearing has been conducted and the search warrant executed or the request therefor denied.

(e) Any person who has personal knowledge of the magistrate's order concerning the protection of the matter sought to be seized who knowingly disobeys the order and removes, changes, alters, or destroys the matter sought to be seized shall be guilty of a misdemeanor and shall be punished by fine of not more than $1,000 or by confinement in the county jail for not more than six months, or by both fine and confinement.

(f) At the time of the hearing on the issuance of a search warrant, the magistrate shall hear evidence concerning the obscenity of the matter and shall examine the matter or any copy of the same if produced in court, and shall afford any person in possession of the matter sought to be seized or claiming ownership of the matter an opportunity to be heard as to the obscenity or nonobscenity of the matter. At the close of the hearing the magistrate shall make a determination as to the obscenity or nonobscenity of the matter and shall determine if probable cause exists for the immediate issuance of a search warrant for its seizure.

(g) If the magistrate finds the matter to be obscene and that probable cause exists for the immediate issuance of a search warrant, then he shall issue a search warrant ordering the seizure of the matter described in the affidavit for a search warrant under the provisions of the Code of Criminal Procedure of Texas.

(h) In the event that a search warrant is issued and matter alleged to be obscene is seized under the provisions of this section, any person alleged to be in possession of the said matter or claiming ownership of the matter at the time of its possession or seizure may file a notice in writing with the magistrate within 10 days of the date of the seizure alleging that the matter is not obscene and the magistrate shall set a hearing within one day after request therefor, or at such time as the requesting party might agree, and at such hearing evidence may be presented as to the obscenity of the matter seized and at the conclusion of such additional hearing, the magistrate shall make a further determination as to the obscenity or nonobscenity of the matter. If at such hearing the magistrate finds the matter not to be obscene, then it shall be returned to the person or persons from whom it was seized.

(i) When a search warrant is issued under the provisions of this section, only that matter described in the complaint shall be seized by the executing peace officer or officers.

(j) Procedures under this section for the seizure of allegedly obscene matter shall be cumulative of all other lawful means of obtaining evidence as provided by the laws of this State. Nothing contained in this section shall prevent the obtaining of alleged obscene matter by purchase or under injunction proceedings as authorized by this Act or by any other statute of the State of Texas.

Destruction of matter or advertisement upon conviction of accused; seizure and disposition of personal property used to make, etc. obscene material

Sec. 10. Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control. In addition, the court may order the seizure of all tangible personal property of the accused which was used to make, print, show, or distribute the obscene material. The property shall be forfeited and disposed of as provided in Article 18.30, Code of Criminal Procedure, 1965, as amended.

Preparing, etc., obscene matter or advertising elsewhere for sale or distribution in this state: extradition

Sec. 11. Every person, whether or not he is a citizen of or present in this state, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this state, or who knowingly sends or causes to be sent into this state for sale or distribution any obscene matter or any advertising promoting the sale or distribution of obscene matter, shall be subject to the penalties of this Act, and the executive authority of this state shall demand extradition of such person from the executive authority of the state in which such person is found.

Policy (local regulation)

Sec. 12. No city, county or other political subdivision may enact any regulation of obscene material which conflicts with the provisions of this Act; however, a city, county, or other political subdivision is authorized to regulate further the means and manner of distribution and exhibition of matter.

Enforcement by injunction, etc.

Sec. 13. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district, county, or city attorney within their respective jurisdictions, or the Attorney General to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter.

Amended by Acts 1943, 48th Leg., p. 38, ch. 35, § 1; Acts 1955, 54th Leg., p. 386, ch. 107, § 1; Acts 1957, 55th Leg., p. 425, ch. 203, § 1; Acts 1961, 57th Leg., p. 1041, ch. 461, § 1, eff. June 16, 1961; Acts 1969, 61st Leg., p. 1547, ch. 468, § 1, eff. June 10, 1969; Acts 1971, 62nd Leg., p. 2723, ch. 887, §§ 1 to 3, eff. Aug. 30, 1971; Acts 1971, 62nd Leg., p. 3406, ch. 1038, § 1, eff. June 17, 1971.

Section 3 of the amendatory Act of 1955 repealed all conflicting laws and parts of laws to the extent of such conflict. Section 4 provided that partial invalidity should not affect the remaining portions of the Act.

Section 2 of the amendatory Act of 1957 repealed all conflicting laws and parts of laws to extent of conflict only. Section 3 was a severability clause.

Acts 1969, 61st Leg., p. 1547, ch. 468, §§ 2, 3 provided:

"Sec. 2. Severability. If any provisions, clause, sentence, paragraph, section, phrase or part of this Act, or the application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any other provisions, clauses, sentences, paragraphs, sections, phrases, parts or applications of this Act which can be given effect without the invalid provisions, clause, sentence, paragraph, section, phrase, part or application. To this end the provisions, clauses, sentences, paragraphs, sections, phrases and parts of this Act are declared to be severable.

"Sec. 3. Repeal and saving clause. All Acts and parts of Acts inconsistent or in conflict with this Act are, to the extent of their inconsistency or conflict, hereby repealed, expressly repealing Articles 526 and 527b. This section shall not be construed to affect any suits pending or rights existing or any liability or penalty incurred under those Acts at the time this Act shall take effect."

Art. 527a. Repealed by Acts 1967, 60th Leg., vol. 2, p. 2619, ch. 785, § 4, eff. Sept. 1, 1967

The repealed article, derived from Acts 1955, 54th Leg., p. 386, ch. 107, § 2, as amended by Acts 1955, 54th Leg., p. 1174, ch. 453, § 1, prohibited wholesale distributors from requiring retailers to purchase particular publications to obtain others.

See, now, V.T.C.A. Bus. & C. § 15.06.

Art. 527b. Repealed by Acts 1969, 61st Leg., p. 1547, ch. 468, § 3, eff. June 10, 1969

The repealed article prohibited display or sale of lewd or corruptive comic books, and was derived from Acts 1955, 54th Leg., p. 444, ch. 120. See, now, article 527.

APPENDIX F

(REFFERENCE: AMICUS CURIAE BRIEF AT PAGE 19)

Title 9, Chapter 43, Subchapter B - Obscenity (Article 43.21) of Texas Penal Code, as amended by Acts 1975, 64th Leg. p. 372, Ch. 163, section 1, effective September 1, 1975. . . . F-1

§ 43.21. Definitions

In this subchapter:

(1) "Obscene" means having as a whole a dominant theme that:

(A) appeals to the prurient interest of the average person applying contemporary community standards;

(B) depicts or describes sexual conduct in a patently offensive way; and

(C) lacks serious literary, artistic, political, or scientific value.

(2) "Material" means a book, magazine, newspaper, or other printed or written material; a picture, drawing, photograph, motion picture, or other pictorial representation; a play, dance, or performance; a statue or other figure; a recording, transcription, or mechanical, chemical, or electrical reproduction; or other article, equipment, or machine.

(3) "Prurient interest" means an interest in sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) "Distribute" means to transfer possession, whether with or without consideration.

(5) "Commercially distribute" means to transfer possession for valuable consideration.

(6) "Sexual conduct" means:

(A) any contact between any part of the genitals of one person and the mouth or anus of another person;

(B) any contact between the female sex organ and the male sex organ;

(C) any contact between a person's mouth or genitals and the anus or genitals of an animal or fowl; or

(D) patently offensive representations of masturbation or excretory functions.

Amended by Acts 1975, 64th Leg., p. 372, ch. 163, § 1, eff. Sept. 1, 1975.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1588

CAROL VANCE, *et al.*,

Appellants,

v.

UNIVERSAL AMUSEMENT CO., INC., *et al.*,

Appellees.

GEORGE E. McCREA, *et al.*,

Appellants,

v.

KING ARTS THEATRE, INC.,

Appellee.

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC. AND THE FREEDOM TO READ FOUNDATION, AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES

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Article 4667, Texas Rev. Civ. Stat. .....*passim*

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Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the National

Association of College Stores, Inc. and The Freedom to Read Foundation (collectively referred to as "Amici") submit this joint brief *amici curiae,* pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of appellees. This joint brief is submitted upon the written consent of both appellants and appellees.[1]

The *Amici*

Amici's members publish, produce, distribute, sell and lend books, magazines and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State of New York. It is a major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schoools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

[1]The originals of appellants' written consent by the Attorney General of Texas, and of appellees' consent by Frierson M. Graves, Jr. are being filed herewith.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over four hundred fifty independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to whosesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights, and to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled.

Interest of the *Amici*

The filing of this brief reflects *Amici's* continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on obscene materials not protected by the First Amendment, which restrictions also affect First Amendment protected materials.

This case presents two questions which are of vital concern to *Amici*—whether an order closing a premises, thereby prohibiting the dissemination from that premises of all materials, including those protected by the First Amendment, based on a finding of previous dissemination of obscene materials, violates the First Amendment to the United States Constitution, and whether an injunction barring dissemination by defendants of obscene materials for one year, based on the same finding, violates the First Amendment. The Fifth Circuit, en banc, suggested that the closure was unconstitutional but found it unnecessary to so find; it held that the injunction violated the First Amendment. *Universal Amusement Co., Inc.* v. *Vance*, 587 F. 2d 159 (5th Cir. 1978).

Amici are concerned that the reversal of the decision of the court below, which accords with the decisions of most other courts in the United States on these questions, would be a radical departure from traditional First Amendment standards created by the Court. The existence of prior restraints in this sensitive area would impede the flow of First Amendment-protected material by reason of the fear of retailers that something they sold or exhibited might subsequently be found obscene.

The *Amici* further fear that if the decision of the Court of Appeals is reversed and the Texas statute upheld, such legislation would be enacted and actively enforced throughout the United States in an effort by over-zealous public officials to control perceived public "nuisances," greatly inhibiting the fundamental freedoms protected by the First Amendment.

For these reasons, *Amici* respectively submit this brief urging the Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

Two questions were before the court below: constitutionality of Article 4666, Texas Rev. Civ. Stat., which permits the mandatory closing of premises in certain situations for one year, and constitutionality of Article 4667, Texas Rev. Civ. Stat., which permits the granting of injunctions to abate public nuisances, including situations in which the alleged nuisance is the "commercial manufacturing, commercial distribution, or commercial exhibition of obscene material."

It is not clear what issues are before the Court. Appellants, in both their jurisdictional statement (page 3) and their brief (page 3), emphatically state that the constitutionality of Article 4666 is not at issue in this appeal:

> *Article 4666, Vernons Texas Civil Statutes is not involved in the appeal by Appellants Vance and McCrae.* . . .[T]his provision was never applied by these Appellants, was not part of their appeal to the Court of Appeals and the ruling of the Court of Appeals (majority opinion)—that the closing provisions are unconstitutional as applied to motion picture houses or bookstores—is not questioned by these Appellants in this Court.

Neither the jurisdictional statement nor appellant's brief contains a list of questions presented. However, the brief of Charles H. Keating, Jr. as *amicus curiae* in support of appellants, includes as one of the questions presented for review (page 9) the constitutionality of Article 4666. His brief argues the question at length.

Because it is not clear whether the constitutionality of Article 4666 is under consideration by the Court, we will not limit our discussion to the constitutionality of Article 4667 but will also address the constitutionality of Article 4666.

I.

An injunction against the sale or exhibition of materials not previously found obscene by a court is a prior restraint in violation of the First and Fourteenth Amendments to the U.S. Constitution.

The ban on prior restraints is the cornerstone of the First Amendment to the U.S. Constitution. The importance of the ban on prior restraints was clearly stated in *Near* v. *Minnesota,* 283 U.S. 697, 713 (1931):

> [I]t has been generally, if not universally, considered that it is the chief purpose of the guaranty [of freedom of the press] to prevent previous restraints upon publication.

In *Near,* the Court discussed the historical basis for the fundamental principle barring prior restraints and indicated that the limitation "has been recognized only in exceptional cases" (283 U.S. at 716). These exceptions, generally dealing with national security and other emergency situations of similar import,[2] do not have relevance to this case. As put more recently by the Court in the "Pentagon Papers" decision:

> "Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963); see also *Near* v. *Minnesota,* 283 U.S. 697 (1931). The government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971).

New York Times Co. v. *United States,* 403 U.S. 713, 714 (1971) (per curium opinion).

[2] *Cf. New York Times Co.* v. *United States,* 403 U.S. 713 (1971).

As *Amici* will demonstrate, both Articles 4666 and 4667 are unconstitutional prior restraints on the dissemination of First Amendment-protected material.

Article 4667(a)(3) of Texas Rev. Civ. Stat. provides for the enjoining of the use of a premises for the "commercial manufacturing, commercial distribution or the commercial exhibition of obscene material." Even where, as is apparently the case in Texas, such an injunction defines the materials enjoined in terms of the present *Miller* test for obscenity, the injunctive relief includes the prohibition of manufacturing, distribution and exhibition of materials not yet found obscene by a court, placing the responsibility for evaluating the material and the risk of violating the injunction on the retailer or exhibitor.

The Court has repeatedly held that speech protected by the First Amendment cannot be enjoined. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971); *United Transp. Union* v. *State Bar,* 401 U.S. 576 (1971). Speech is protected until it is found in court to be obscene, and therefore outside the scope of the First Amendment. There is a fine "line between legitimate and illegitimate speech." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 559 (1975). Although Article 4667 purports to enjoin only the publication, distribution, or exhibition of obscene materials, the effect is to place the burden of determining what is obscene on the bookseller or motion picture theater operator. Thus, self-censorship will curtail the availability of First Amendment-protected material to the general public.

Amici are publishers, distributors, lenders, and sellers of printed materials protected by the First Amendment. *Amici* wish to emphasize that the concern expressed by the

court below as to the dangers of self-censorship is a real and practical concern. Time after time *Amici* have experienced a direct impact when laws abridging the First Amendment are passed. Until such laws are enjoined, found unconstitutional or repealed, retailers and others face-to-face with the governmental enforcers of such laws have declined to deal in materials which, although not obscene, would cause them to run the risk of expensive litigation and public obloquy.

It might be contended that the burden placed on retailers and others by such an injunction is no different than the burden they already face in connection with potential criminal liability under the obscenity laws. This view ignores several significant and determinative differences.

Perhaps most important of these is that the procedure for trial and punishment upon conviction for contempt includes none of the safeguards available to defendants charged under the criminal law for alleged dissemination of obscene materials. The differences between the procedure at trial for contempt and the subsequent criminal trial for dissemination of obscene materials are as follows:

> The presumption of innocence, the heavier burden of proof borne by the government, the stricter rules of evidence, the stronger objection to vagueness, the immeasurably tighter and more technical procedure —all of these are not on the side of free expression when its fate is decided.

Emerson, "The Doctrine of Prior Restraint," 20 Law and Contemporary Problems 648, 657 (1955).

Of equal significance is the loss of the right to jury trial, particularly in light of the Court's emphasis on the

"community standards" test in deciding whether a publication is obscene. As Justice Brennan pointed out:

> The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards.

McKinney v. *Alabama*, 424 U.S. 669, 688 (1976) (concurring op.)

Finally, there is the perception of the party enjoined that he is under constant official scrutiny—that there is an injunction directed at him alone. The chilling effect created by this perception, coupled with the inherent difficulty under the *Miller* test of determining what is obscene, inevitably will result in the withdrawal from distribution of protected material. The chilling effect is heightened by the fact that, under Article 4667(b), this action can be brought and enforced by any private citizen, for whatever motive, unrestrained by the normal checks and balances of government. As the Court is well aware, numerous private groups believe to be obscene that which is believed to be non-obscene by the community as a whole. Such groups, under a statute such as this, may freely act as self-appointed public prosecutors. "Because the line between unconditionally guaranteed speech and speech that may be legitimately regulated is a close one, the 'separation of legitimate from illegitimate speech calls for . . . sensitive tools.' Speiser v. Randall, 357 U.S. at 525. . . ." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561 (1975). Articles 4666 and 4667 are not sensitive tools; rather, they are bludgeons.

II.

An order closing a premises disseminating presumptively First Amendment-protected material is a prior restraint in violation of the First and Fourteenth Amendments to the U.S. Constitution.

Article 4666 of the Texas Rev. Civ. Stat. provides that whenever a court finds that a nuisance exists, judgment shall be entered abating the same, enjoining the defendants from maintaining the same, and "ordering the said house be closed for one year from the date of judgment" unless defendants post a penal bond of from one to five thousand dollars. The bond is conditioned on the non-repetition of the acts constituting the nuisance during the one year period. If this condition is not met, the penal bond is forfeited.

Appellants purported to apply Article 4666 to bookstores and motion picture theaters. While the decision of the court below strongly suggests its view that Article 4666 is an unconstitutional prior restraint when applied to bookstores, motion picture theaters and other disseminators of First Amendment-protected material (587 F.2d at 165-166), the court, applying the rule that "federal courts should refrain from passing upon a constitutional question" if there is an alternative statutory construction which would uphold the state statute, found that Article 4666 was not intended to be applicable to obscenity/nuisance cases.[3]

Amici has no basis to support or contest that finding. (Apparently there is no relevant legislative history.) However, in view of the position taken by *Amicus* Keating (see page 5 above), we strongly point out that if Article 4666

[3] While six judges in the court below discussed as to the finding of unconstitutionality of Art. 4667, the result as to Article 4666 was unanimous (587 F.2d at 173).

were construed to include within the category of nuisance cases conduct based on the sale or distribution of obscene materials, such an application of Article 4666 would violate the First Amendment to the U.S. Constitution.

Article 4666 permits the state, on a finding of prior sales or exhibitions of obscene material, to close the store, theater or other premises involved for one year, unless certain conditions are met.

The closing of a bookstore or motion picture theater is clearly a prior restraint of the broadest and most absolute kind. Nothing can be sold or displayed on the premises; even material clearly innocuous and protected by the First Amendment is barred. As the court below stated:

> Read together, Articles 4666 and 4667 clearly create a prior restraint. The statutes allow the state to close, for one year, a theatre that has exhibited obscene films. Unless a bond from $1,000 to $5,000 is posted, the showing of any motion picture is punishable by contempt of court. Thus, future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near* v. *Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Moreover, although a theater operator may post the bond and show films, he forfeits that bond if one of the films he has selected is deemed obscene. This statutory scheme obviously encourages a theater operator to steer wide of the danger zone by avoiding borderline films that are nonetheless protected under the first amendment. The line between obscenity and protected speech is "dim and uncertain," *Bantam*

Books, Inc. v. *Sullivan*, supra 372 U.S. at 66, 83 S.Ct. 631, and difficulty in locating that line leads to self-censorship, a particularly subtle and most insidious form of the malady. *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (defamation). (587 F. 2d at 165-166).

Amicus Keating argues strenuously that the decision of the Ohio Supreme Court in *State of Ohio ex rel. Ewing* v. *"Without a Stitch,"* 307 N.E. 2d 911 (Ohio 1974), and the action of the Court dismissing for want of a substantial federal question an appeal from that decision (*sub nom. Art Theater Guild Inc.* v. *Ewing*, 421 U.S. 923 (1975)), are "squarely in point" on this issue. *Amici* believe that the decision of the Ohio Supreme Court is erroneous and does not correctly apply the precedents of the Court as to the protections of the First Amendment. Even so, under the Ohio court's decision, Article 4666 would be invalid. To sustain the constitutionality of the Ohio statute, the Ohio Supreme Court defined the nuisance in question as the showing or sale of material which had already been found by the court to be obscene. Thus the bond posted by the proprietor would be subject to forfeiture only if the proprietor again sold or exhibited the material already held obscene. This certainly is a far cry from the Texas statute, under which the bond posted in lieu of closure is subject to revocation if the "acts prohibited in this law shall . . . be done . . . in said house," *i.e.*, the sale or exhibition of any material which may at some future time be found obscene.

The facts of one of the cases before the Court in this consolidated appeal demonstrates the breadth of the "chilling effect" of the unconstitutional prior restraint. In *King Arts Theatre, Inc.* v. *McCrea*, the mere act of an informal

communication by the county attorney to the theatre's landlord informing the landlord that an injunctive action was about to be commenced resulted in the landlord attempting to terminate the theatre's lease. The possibility that material sold will, at some time after its sale, be held to be obscene requires that the bookseller, to save his bond, censor the materials he sells and refuse to sell anything he believes may at a later date be deemed to be non-protected.

Amici therefore submit that, as has been held in all the reported cases known to *Amici*,[4] the closure provisions embodied in Section 4666 are a prior restraint on freedom of speech and the press in violation of the First and Fourteenth Amendments to the U.S. Constitution.

CONCLUSION

In view of the foregoing, the *Amici* respectfully urge the Court to affirm the decision below.

Respectfully submitted,

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[4] See, *e.g.*, *Gulf States Theatres of Louisiana, Inc.* v. *Richardson*, 287 So. 2d 480 (La. 1973); *Sanders* v. *State*, 203 S.E. 2d 153 (Ga. 1974); *People ex rel. Busch* v. *Projection Room Theater*, 500 P.2d 600, 609-610 (Cal. 1976).